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In the
Supreme Court of the United States

Beverly California Corp.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board is authorized by Section 10(c) of the National Labor Relations Act to impose cease and desist and affirmative action orders upon work locations that have never committed unfair labor practices and are not otherwise involved in the underlying proceedings, simply because violations have been found at other work locations owned or operated by the same employer.

2. Whether a Court of Appeals can impose a word limitation on briefs that is so stringent that it effectively deprives an employer of its statutory right, under Section 10(f) of the National Labor Relations Act, to obtain judicial review of a National Labor Relations Board Decision and Order, and whether the same conduct also constitutes a denial of due process.

PARTIES TO THE PROCEEDINGS

Petitioner

The Petitioner in this case is Beverly California Corporation, which is a subsidiary of Beverly Enterprises, Inc. Beverly Enterprises, Inc. is traded publicly on the New York Stock Exchange. Petitioner is not related to any other publicly held or publicly-traded companies.

The only other party to appear and present argument in the Court of Appeals was the Service Employee International Union ("SEIU"), AFL-CIO, and Districts 1199P and 1199II, SEIU, AFL-CIO. The United Food and Commercial Workers Union, AFL-CIO entered an appearance in the Court of Appeals but was subsequently dismissed from the proceeding prior to argument.

Respondent

Respondent is the National Labor Relations Board ("NLRB").

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DECISIONS BELOW

The proceedings below are officially reported as follows:

1. Beverly California Corp. v. National Labor Relations Board, 227 F.3d 817 (7th Cir. 2000). The Decision is reproduced in the Appendix at App. A.

2. Beverly California Corp., 326 NLRB 153 (1998). The Decision is reproduced in the Appendix at App. F.

3. Beverly California Corp., 326 NLRB 232 (1998). The Decision is reproduced in the Appendix at App. G.

4. The Court of Appeals May 11, 1999 Order regarding page limitations is unreported and is reproduced in the Appendix at App. D.

5. The Court of Appeals May 19, 1999 Order denying Petitioner's Motion for Leave To File a Motion For Reconsideration is unreported and is reproduced in the Appendix at App. E.

6. The Court of Appeals January 8, 2001 Order denying Petitioner's Motion for Panel Rehearing is unreported and is reproduced in the Appendix at App. B.

7. The Court of Appeals March 23, 2001 Judgement is unreported and is reproduced in the Appendix at App. C.

A related prior case is reproduced in relevant part in the Appendix at App. M. That case is Torrington Extend-A-Care Employee Assn. v. NLRB, 17 F.3d 580 (2d Cir. 1994)

denying enforcement in relevant part to Beverly California Corp., 310 NLRB 222 (1993).

JURISDICTION

On August 21, 1998, the National Labor Relations Board ("Board") simultaneously issued two decisions and orders, Beverly California Corp., 326 NLRB 153 (1998) and Beverly California Corp., 326 NLRB 232 (1998). Petitions seeking review of these two decisions and orders were consolidated in the United States Court of Appeals for the Seventh Circuit. The Court of Appeals issued its decision on September 13, 2000 and denied a petition for rehearing on January 8, 2001. This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution is reproduced in the Appendix at App. O.

The full text of Section 10(c) of the National Labor Relations Act is reproduced in the Appendix at App. O. In relevant part, it provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action

> including reinstatement of employees with or without backpay, as will effectuate the policies of this Act... [29 U.S.C. § 160(c)]

Section 10(f) of the National Labor Relations Act provides in full:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with

> respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [29 U.S.C. § 160(f)]

Section 702 of the Administrative Procedures Act [5 U.S.C. § 702] is reproduced in the Appendix at App. O.

Section 706 of the Administrative Procedures Act is reproduced in the Appendix at App O.

28 U.S.C. §§ 2072(a) and (b) provide:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

A. Background Of Prior Litigation

Beverly California Corporation ("Beverly") operates 895 nursing homes nationwide (App. G at 440a). The present cases are a consolidation of the second and third in a series of administrative proceedings initiated by the Board against Beverly. The procedural history of the first such proceeding, Beverly California Corp., 310 NLRB 222 (1993) ("Beverly I"), is material to the present consolidated cases. In Beverly I, the Board's General Counsel accumulated all unfair labor practice charges that were filed nationally against Beverly nursing homes between 1986 and 1988 and then issued a consolidated complaint against 33 nursing homes. The General Counsel then asked the Board to use the unfair labor practice allegations relating to those 33 nursing homes as the basis for issuing a cease and desist order and other affirmative relief covering all 985 then-existing nursing homes nationwide. The Board found that certain violations occurred, and it issued an order requiring all 985 Beverly nursing homes to cease and desist from the conduct that had occurred at the underlying 33 nursing homes. The Board further ordered all 985 nursing homes to post a notice informing employees as to what had occurred at the 33 nursing homes and assuring employees that no similar conduct would occur again.

The Court of Appeals for the Second Circuit declined to enforce these nationwide provisions of the Board's Order, sub nom. Torrington Extend-A-Care Employees Association v. NLRB, 17 F.3d 580, 586 (2d Cir. 1994) (App. M). The court concluded that "violations at 3% of a company's facilities does not show an anti-union animus amounting to a proclivity to violate the Act", particularly where "most employment actions were handled at the facility level and never rose above the division level." Id.; App. M at 624a.

The court concluded that Beverly's corporatewide labor policy was lawful and that "[b]y and large, the presence of divisional personnel in union campaigns at individual facilities appears to have had a positive effect, and Beverly should not be punished merely because isolated unfair labor practices occurred when division personnel were present." Id. at 586-87; App. M at 625a. The case was remanded to the Board, and the Board then developed separate orders for each nursing homes, fully remedying the alleged unfair labor practices. Beverly California Corp., 316 NLRB 888 (1995).

B. The Underlying NLRB Proceedings

The present case stems directly from the aftermath of the Beverly I decision and constitutes the Board's General Counsel's second and third effort to obtain the same nationwide relief that was rejected by the Second Circuit. The first Board Decision at issue here is Beverly California Corp., 326 NLRB 153 (1998) ("Beverly II") (App. F). As it did in Beverly I, and over Beverly's strong objection, the Board's General Counsel accumulated all unfair labor practice charges that were filed nationally against Beverly nursing homes from 1988 through 1991 and then issued a consolidated complaint against 21 nursing homes. The General Counsel again sought a cease and desist order and other relief that would extend to all of Beverly's then-existing 895 nursing homes nationwide rather than the actual 21 nursing homes where unfair labor practices allegedly occurred. On June 29, 1994, an administrative law judge issued a decision finding that 17 of the 21 nursing homes had committed a total of 48 unfair labor practices, and the judge recommended the issuance of a cease and desist order and notice-posting requirement applicable to all 895 nursing homes because "it is my obligation to follow applicable Board precedent even when there exists a conflict

with U.S. Circuit Courts of Appeal." (App. F at 392a). Beverly filed exceptions to the recommended decision.

Meanwhile, from 1991 through 1993, the General Counsel continued its practice of accumulating charges against Beverly facilities, and it issued another consolidated complaint against 11 nursing homes. This proceeding became Beverly California Corp., 326 NLRB 232 (1998) ("Beverly III") (App. G). On June 12, 1995, an administrative law judge found that nine of the 11 nursing homes had committed a total of 28 unfair labor practices, and he recommended the same corporatewide cease and desist order and notice-posting requirement. Beverly again filed exceptions.

On August 21, 1998, the Board simultaneously issued decisions in Beverly II and Beverly III, substantially adopting each ALJ's unfair labor practice findings. The Beverly II Decision did not grant the nationwide order sought by the General Counsel. Instead, like the earlier Beverly I Decision on Remand, 316 NLRB 888, the Board crafted separate orders for each nursing home tailored to address only the unfair labor practices that occurred at those homes.

In its Beverly III decision, however, the Board concluded that the combined unfair labor practice findings in Beverly I, Beverly II and Beverly III warranted the same nationwide cease and desist order and notice-posting at all 895 Beverly nursing homes that the Court of Appeals for the Second Circuit earlier rejected (App. G at 427a).

C. Proceedings In The Court Of Appeals

Section 10(f) of the NLRA authorizes aggrieved parties to seek review of Board decisions and orders in the courts of appeals. 29 U.S.C. § 160(f). Beverly and various unions immediately filed petitions in various circuits to review each of the Board's decisions. These petitions eventually were transferred to the Court of Appeals for the Seventh Circuit

and consolidated into a single proceeding, since the Order issued in Beverly III was based in part on the unfair labor practice findings in Beverly II.

Beverly petitioned the Court of Appeals to review 42 specific unfair labor practice findings from the two Decisions in addition to the Board's unprecedented nationwide order. Federal Rule of Appellate Procedure ("F.R.App.P.") 32(a)(7) limits the length of briefs in ordinary cases to 14,000 words. Seventh Circuit Local Rule 28(d)(1)(B) permits a party to file a motion for "enlargement of the number of pages when the norm established by this rule proves inappropriate." Beverly's Counsel refined its Brief to the minimum text necessary to present facts and argument on the 42 alleged unfair labor practices and the corporatewide order, and Beverly then filed a motion to enlarge the word limitation by 272% to 52,604 words. The Honorable Diane P. Wood, Circuit Judge, denied Beverly's request and permitted Beverly only to file a Brief consisting of 19,600 words - - a 40% increase (App. D).

Although F.R.App.P. 27(c) states that the "court may review the action of a single judge", Judge Wood ruled that the "court will not entertain a motion to reconsider this order", and she subsequently denied Beverly's Motion For Leave To File A Motion For Reconsideration And Request For En Banc Consideration Of The Motion Or Alternatively Three-Judge Panel Review (App. E). Beverly then filed a brief complying with the word limitation.

On September 13, 2000, Judge Wood authored a decision that declined to enforce three of the Board's unfair labor practice findings - - including the only unfair labor practice allegation at Beverly's Wyoming Valley facility - - but enforced the remainder of the Board's findings and conclusions (App. A). The court then held that the National Labor Relations Act authorized the Board to extend the terms of its Order beyond the 25 nursing homes where unfair labor practices were found to have occurred. The court remanded

Beverly III to the Board with instructions to make ministerial changes in the language of the nationwide order, but the court ruled that the Board was entitled to impose nationwide relief. (App. A at 49a). The court denied a petition for rehearing on January 8, 2001.

ARGUMENT

THE PAGE LIMITATION IMPOSED BY JUDGE WOOD DEPRIVED BEVERLY OF ITS STATUTORY RIGHT TO MEANINGFUL APPELLATE REVIEW AND CONSTITUTED A DENIAL OF DUE PROCESS.

This case presents an important issue necessitating this Court's exercise of its supervisory authority over the courts of appeals in order to prevent a Federal Rule of Appellate Procedure from being used in a manner that deprives a party of its statutory and Constitutional right to obtain appellate review of an agency order. Beverly fully recognizes that this Court will be extremely reluctant to intervene in a discretionary court of appeals issue such as the word limitation for a brief. Beverly also recognizes the importance of concise presentation of facts and argument, as well as the constraints that federal appellate judges face in processing an increasing number of cases through an overworked federal court system. However, there is a point at which judicial expediency can deprive a party of substantive rights that are guaranteed by federal statutes and the Constitution, and Beverly's situation plainly is such a case.

Through Section 10(f) of the NLRA, Congress specifically grants aggrieved persons, like Beverly, the legal right to obtain court of appeals review of any orders issued by

the Board.[1] This statute obligates the reviewing court to set aside findings of fact and conclusions of law that are not supported by substantial evidence. It also requires the reviewing court to set aside a Board Order that exceeds the agency's statutory authority.[2] Like most courts of appeals, the Seventh Circuit specifically requires a petitioner's brief to set forth all relevant facts and arguments for each portion of the Board's Decision that the petitioner seeks to challenge upon review, and failure to do so constitutes a waiver of the right to seek review of those issues. Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991). See also, Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.2d 1116, 1122 (7th Cir. 1998) (the court of appeals has no obligation to consider an issue "that is merely raised, but not developed, in a party's brief").

A tension is created, however, when an administrative agency case is massive in size. A party like Beverly is legally entitled to obtain review of each finding of fact and conclusion of law that serves as a basis for the agency's order, and a party cannot be denied this right of review simply because of the size of the case. This is particularly true in a case like this one where the litigation strategy of Board's General Counsel has purposefully inflated the size of the proceeding by consolidating unrelated cases, and the Board itself has purposefully inflated the size of the proceeding both by issuing the Beverly II and Beverly III decisions simultaneously and by linking the order in one case to the facts of the other case.

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[1] The same right is guaranteed under the Administrative Procedures Act, 5 U.S.C. §§ 702, 706.

[2] Similarly see 5 U.S.C. § 706.

Unique cases of this extraordinary size do not fit neatly within the procedures that the courts of appeals use for processing ordinary cases. Those procedures are set forth in the Federal Rules of Appellate Procedure ("F.R.App.P."). F.R.App.P. 32 establishes a 14,000 word limitation for briefs filed in ordinary cases. Local rules - - like the Seventh Circuit's Rule 28(d)(1)(B) - - give the appellate courts discretion to enlarge the word limitation if the established norms "prove inappropriate".

Under no circumstances, however, may a procedural rule such as a word limitation, be applied in a manner that abridges a party's substantive statutory and Constitutional rights. In 28 U.S.C. § 2072, Congress granted the Supreme Court "the power to prescribe general rules of practice and procedure" in the United States courts of appeals, but Section 2072(b) specifically provides, in relevant part: "(s)uch rules shall not abridge, enlarge or modify any substantive right."

The same principle applies to local rules developed by federal courts under the authority of 28 U.S.C. § 2071. See, Frazier v. Beebe, 482 U.S. 641, 645-646, 107 S.Ct. 2607, 2611 (1987). Furthermore, it is this Court's obligation to exercise its supervisory authority to prevent a federal court from using the federal rules of appellate procedure as a mechanism to deprive a party of its statutory right to meaningful appellate review. See, Frazier v. Beebe, supra. See also, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, n. 5, 102 S.Ct. 1148, 1154, n. 5 (1982) (emphasizing the "basic importance" of being given "a meaningful opportunity to be heard"); Boddie v. Connecticut, 401 U.S. 371,377, 379, 91 S.Ct. 780, 785, 786 (1971) (imposing filing fee upon indigents effectively denies them "a meaningful opportunity to be heard").

The 19,600 word limitation imposed by Judge Wood was a clear abuse of discretion because it operated to deprive Beverly of the meaningful opportunity to obtain review of the

two orders issued by the Board in these consolidated cases. The size of the two underlying proceedings is simply monstrous. According to the Board's own estimates, the underlying records for the combined Beverly II and Beverly III cases consist of more than 14,000 transcript pages and more than 4,000 exhibits.[3]

The unprecedented size of this proceeding was a direct result of the litigation strategy employed by the Board's General Counsel. Previously, if the General Counsel believed an unfair labor practice had occurred in a Beverly nursing home, the General Counsel treated Beverly like any other employer and brought an action against that nursing home individually.[4] But commencing with Beverly I and continuing through Beverly II, the General Counsel consolidated cases in an effort to show the scope of the alleged misconduct. In Beverly II, the General Counsel consolidated 21 cases that ordinarily would have been heard and decided separately by the Board. The cases did not involve any common factual obligations - - meaning that there is not a single instance in which the conduct of a manager at one facility impacted employees at another facility, nor is there any instance in which conduct at one facility became known to employees at another facility. The only link between these unrelated cases is that Beverly or one of its subsidiaries owned or operated each of the 21 nursing homes (App. F). The General Counsel

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[3] (App. J, K). One of these documents contains a typographical error and says "100 exhibits" when the actual number is "1,000 exhibits." (App. J at 607a).

[4] E.g., Provincial House Living Center, 287 NLRB 158 (1987); Fountainview Place, 281 NLRB 26 (1986); Parkview Gardens Care Center, 280 NLRB 47 (1986); Leisure Lodge, 279 NLRB 327 (1986); Cumberland Nursing Center, 263 NLRB 428 (1982).

used the same approach in Beverly III, consolidating 11 separate cases involving no common factual allegations other than ownership (App. G).

In recognition of the prejudicial effect that its General Counsel's unique consolidation approach had on Beverly, the Board in Beverly II waived its own generally applicable 50-page limitation on briefs and granted Beverly up to 300 pages for initial briefing (App. H). The Board subsequently did the same in Beverly III, again granting Beverly 300 pages for initial briefing (App. I). The necessity of these page enlargements was confirmed when the Board issued its decisions in the two cases and the decisions totaled 140 pages in length.

In its petition for review, Beverly sought to challenge 42 separate unfair labor practice findings that were made by the Board in Beverly II and Beverly III. Not a single one of these challenges was based on the credibility of witnesses. Each challenge involved an issue of law or what Beverly firmly believed to be a lack of substantial supporting record evidence. Indeed, despite the inadequate opportunity for briefing, the Court of Appeals set aside three of the Board's unfair labor practice findings (App. A at 15a-24a) and expressed skepticism regarding at least 10 others before uncritically deferring to the Board's view of the evidence.[5]

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[5] "(W)e agree with Beverly that this is a close point" (App. A at 22a). "Merely to say that there was another way of looking at the evidence cannot carry the day for Beverly (App. A at 30a); "[w]e are thus not persuaded that the finding must be overturned" (App. A at 32a); "the Board's conclusion that a violation had occurred did not go beyond the boundaries of that evidence" (Id.); "[t]his was a permissible inference from the evidence" (App. A at 35a); "inferences drawn from specific facts can go either way, and thus . . . we must defer to the Board" (App. A at 36a); "[o]nce again, the fact that this incident can be seen in

There is an excellent chance that, if Beverly had been permitted to fully brief these unfair labor practice allegations, a large number of these "close call" allegations would have been set aside because, with ample briefing space, Beverly could have demonstrated that the "substantial evidence" to which the court deferred was inaccurate or was not contained within the record. **Because of Judge Woods's word limitation, Beverly was forced to brief 42 separate and unrelated unfair labor practice findings within less than 25 pages of text, with generally only one paragraph per allegation.** A different ruling by the court of appeals on these remaining unfair labor practice findings may well have changed the court's view of the Board's nationwide order.

Not only is this 19,600 word limitation a deprivation of Beverly's statutory rights under Section 10(f) of the NLRA, it also constitutes a deprivation of Beverly's due process rights under the Fifth Amendment. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan v. Zimmerman Brush Co., supra, 455 U.S. at 429, 102 S.Ct. at 1154. The Court has also repeatedly held that the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts, **even in aid of their own valid processes** to dismiss an action without affording a party the opportunity

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a more innocuous light is not enough to win the day for Beverly" (App. A at 38a); "we cannot say that the Board's inferences were unreasonable" (App. A at 39a); "[t]here was enough evidence here from which the Board could infer a violation" (App. A at 41a); "[w]hile we see this as a close call, close calls go to the Board under the applicable standard of review" (App. A at 44a); "[o]nce again, given the deferential nature of substantial evidence review, we see no reason to reverse this finding" (App. A at 46a).

for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094 (1958) (emphasis added) (reversing dismissal for failure to fully comply with a pretrial production order); Logan v. Zimmerman Brush Co., supra, 455 U.S. at 429, 432, 102 S.Ct. at 1154, 1156 (once the legislature confers a property interest, such as access to an administrative agency's adjudicatory procedures, deprivation of that property interest must be analyzed in constitutional terms). Needless to say, a word limitation that precludes a party from raising facts and arguments is tantamount to a dismissal of an action.

Lastly, it is clear that the deprivation of Beverly's property interest occurred as a result of federal government action. The executive branch acted through the Board by consolidating 32 cases that ordinarily would have proceeded separately through the Board's administrative procedure. If the Board had not done this, each case could have proceeded separately to the applicable court of appeals for review, and Beverly would have had ample opportunity to present facts and arguments supporting each individual petition. The judicial branch acted through Judge Wood's imposition of a word limitation that was utterly inadequate for briefing each of the issues that Beverly sought to raise upon review. While there is no doubt that word limitations promote legitimate judicial interests, courts cannot use "their own valid processes" to deny substantive due process rights. Logan v. Zimmerman Brush Co., supra; 28 U.S.C. § 2072(b). The present case is the ideal vehicle for establishing this critical point through the exercise of this Court's inherent supervisory authority over the federal courts. Accordingly, a petition for writ certiorari should issue on this basis alone.

THE NLRA DOES NOT AUTHORIZE THE BOARD TO EXTEND THE REMEDIAL PROVISIONS OF ITS

ORDERS BEYOND WHAT IS NECESSARY TO REMEDY THE SPECIFIC UNFAIR LABOR PRACTICES FOUND BY THE BOARD.

This Court consistently has stated that the scope of the orders that can be issued by the Board is a matter "of importance in the administration of the National Labor Relations Act".[6] The proper resolution of this issue impacts all employers in the United States that operate from multiple locations because the Board is seeking to establish that it has the authority to impose orders at all of an employer's locations based on unfair labor practices accumulated at only 6% of the employer's locations over the course of a 6-year period.

The limits on the Board's remedial authority are set forth in Section 10(c) of the NLRA. Section 10(c) permits the Board to issue orders requiring a person who has committed an unfair labor practice to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c). As this Court has previously held:

> Under 10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders "effectuate the policies of the [Act]." Although this rather

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[6] NLRB v. Express Publishing Co., 312 U.S. 426, 431, 61 S.Ct. 693, 697 (1941); NLRB v. District 50, United Mineworkers of America, 355 U.S. 453, 458, 78 S.Ct. 386, 389, (1958), May Department Stores, Co. v. NLRB, 326 U.S. 376, 378, 66 S.Ct. 203,206 (1945).

> vague statutory command obviously permits the Board discretion, **at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress.**

Sure-Tan, Inc. v. NLRB, 467 U.S. 883,900, 104 S.Ct. 2803, 2813 (1984) (emphasis added).

For this reason, the Board's chosen remedy must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Id., 467 U.S. at 900, 104 S.Ct. at 2813. The Board does not have the statutory authority to use its remedial power as a punitive measure against employers or unions who have committed unfair labor practices, even if the Board believes that the policies of the NLRA might be effectuated by such an order. Consolidated Edison Co. of New York Inc. v. NLRB, 305 U.S. 197, 236, 59 S.Ct. 206, 220 (1938); Local 60, United Brotherhood of Carpenters and Jointers of America, AFL-CIO v. NLRB, 365 U.S. 651,655, 81 S.Ct. 875,877-78 (1961).

The present case is particularly well-suited for review by this Court because the nationwide provisions of the Board's Order contain both a "cease and desist" requirement and an "affirmative action" requirement. These are the two general categories of relief that the Board is authorized to order under Section 10(c). The present Order's cease and desist requirement subjects all Beverly nursing homes to the risk of future contempt proceedings, including the more than 800 nursing homes where no unfair labor practices have ever occurred. The "affirmative action" requirement would force mandatory notice-posting at all 895 Beverly nursing homes even through violation occurred at only 25 of those homes.

Both types of orders are inappropriate for use on a nationwide basis because they do substantially more than what

is necessary to remedy the consequences of the unfair labor practices in these cases and do more than is necessary to dissipate the effects of the unfair labor practices. As such, they are punitive and not remedial. This case presents a unique opportunity for this Court to clarify the statutory limitations upon the Board's remedial authority regarding both cease and desist order and orders requiring affirmative action. The applicable frameworks for analyzing each form of order are discussed below.

A. The Board's Authority To Order Affirmative Action Is Limited To Expunging The Effects Of Unfair Labor Practices.

This Court first addressed the Board's authority to order affirmative action in Consolidated Edison Co., supra, 305 U.S. at 235-236, 59 S.Ct. at 219-20. The Board there had ordered an employer to disavow certain labor contracts the employer had executed with certain unions even though the Board made no finding that the employer had unlawfully assisted the unions in any way. The contracts had been negotiated during a timeframe when unfair labor practices had occurred, and the Board sought to use the "affirmative action" language of Section 10(c) to force the employer to invalidate the contracts. This Court held that the Board's actions exceeded its remedial authority under Section 10(c).

> We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. The power to

> command affirmative action is remedial, not punitive, and needs to be exercised in aid of the Board's authority to restrain violations as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

Id.

In numerous subsequent cases, this Court has repeatedly emphasized that the NLRA does not grant the Board authority to issue "affirmative action" orders that exceed what is necessary to undo the effects of particular unfair labor practice violations. See, Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539, 63 S.Ct. 1214, 1218 (1983) (the Board's authority is to expunge "the effects of unfair labor practices"); NLRB v. The 7-Up Bottling Company of Miami, Inc., 344 U.S. 344, 346, 73 S.Ct. 287, 289 (1953) (Board must fashion "remedies to undo the effects of violations of the Act"); NLRB v. District 50, United Mineworkers of America, supra, 355 U.S. at 456, 78 S.Ct. at 389 (the Board exceeded its "discretionary power under 10(c), 29 U.S.C. § 160(c), to fashion remedies to dissipate the effects of an employer's unfair labor practices in assisting a union.").

This Court has further held that, when crafting any affirmative action remedy, the Board must focus on "the victims of discrimination", and the Board may only order the steps necessary to remedy "the consequences of a violation". Local 60, United Brotherhood of Carpenters and Jointers of America, AFL-CIO v. NLRB, supra, 365 U.S. at 655, 81 S.Ct. at 877, (setting aside Board order requiring reimbursement of union dues). The Board's Order must then be "tailored to the unfair labor practice it is intended to

redress" and "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, Inc. v. NLRB, supra, 467 U.S. 883,900, 104 S.Ct. at 2813.

The nationwide notice-posting requirement ordered by the Board here is not "tailored" in any respect. A notice-posting requirement is generally designed for two groups of employees: (1) the "victims of discrimination"; and (2) other employees who are aware of the unfair labor practices and who need to be informed of the remedial measures so that the unfair labor practices do not discourage them from exercising their NLRA rights. Clearhaven Nursing Home, 236 NLRB 853, 854 n. 5 (1978). A notice certainly is appropriate for employees at the location where unfair labor practices occurred since those employees are presumptively aware of what happened and should be advised that their legal rights will be protected. No remedial purpose is served, however, by notifying employees at Beverly's other 870 nursing homes about unfair labor practices that occurred at 25 nursing homes, when the employees at those 870 nursing homes are not aware of the unfair labor practices and have been neither impacted nor coerced by those unfair labor practices.

The "victims of discrimination" in each of the underlying cases are uniformly located at the nursing homes where the particular unfair labor practices involving them occurred. The Board's decision does not claim - - nor is there any record evidence to suggest - - that employees at one nursing home learned about unfair labor practices at another nursing home. This distinguishes Beverly's situation from those rare cases in which the Board chose to extend its notice-posting requirement to an employer's other locations because knowledge of the unfair labor practices at one location had chilled the exercise of employees Section 7 rights at another

location.[7] Absent such knowledge, no remedial purpose is served by extending an order to locations where no unfair labor practices occurred. The Court of Appeals for the Second Circuit recognized this in Beverly I.

> "With regard to whether employees at other Beverly sites knew of the unfair labor practices in question and would be chilled by them, there simply is no evidence to support such a conclusion. Beverly operates 985 nursing homes, and nothing in the record suggests that employees at other locations had any knowledge of, much less were chilled by, the unfair labor practices. There was no evidence that Beverly's line employees were transferred from facility to facility or that other means of communications spread information about such events."

Beverly I, 17 F.3d at 587 (internal citation omitted).

The Court of Appeals for the Seventh Circuit completely overlooked or ignored this issue in its decision.

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[7] United Aircraft Corp. v. NLRB, 440 F.2d 85, 100 (2d Cir. 1971) (requiring notice-posting at an employer's six Connecticut plants that "all are located in a limited and compact area", where unfair labor practices occurred in five of those six plants); NLRB v. Delchamps, Inc., 653 F.2d 225, 228-229 (5th Cir. 1981) (enforcing a notice-posting requirement at 17 employer-operated stores in the Mobile, Alabama Metropolitan area because the stores were part of the same single bargaining unit and there was regular intermingling of employees). In neither of these cases did the Board extend the terms of the cease and desist order beyond the locations at which unfair labor practices occurred.

The court acknowledged that the scope of the notice-posting was an issue raised by Beverly (App. A at 4a), but the court, then uncritically treated the affirmative action relief as part and parcel of the cease and desist relief and enforced both portions of the Board's Order. A writ of certiorari would allow this Court to expound upon the distinction between "affirmative action" relief and "cease and desist" relief in the unprecedented context of a nationwide remedial order.

B. The Board Exceeded Its Statutory Authority By Issuing A Cease And Desist Order On A Nationwide Basis.

Many employers in the United States have operations in more than one location. If unfair labor practices occur at one of the employer's locations, the Board typically issues a cease and desist order covering that employer location, but the Board does not extend the Order to other employer locations where no unfair labor practices occurred (see footnote 4, supra). The Board's Order in Beverly III extends cease and desist provisions to uninvolved employer locations simply because those locations are owned or operated by the same employer. The Board justifies this Order by relying upon the conduct of various non-corporate Beverly representatives and by pointing to the numerical percentage of nursing homes where unfair labor practices occurred. Whether the Board has the statutory authority to adopt this approach is of paramount importance to all employers who have business operations in more than one location.

This case is the proper vehicle for Supreme Court review of this issue because the record here is fully developed and contains substantial record evidence demonstrating that the unfair labor practices in these cases are location-specific and do not involve conduct or policies that extend beyond the location where the specific unfair labor practices occurred. If

the Board is permitted to proceed with its new approach to cease and desist relief, a nursing home that has never committed an unfair labor practice and has never been the subject of an unfair labor practice complaint could find itself in a federal court of appeals defending a contempt action based on the nationwide cease and desist order issued by the Board in this case.

This Court first addressed the scope of the Board's "cease and desist" remedial authority in NLRB v. Express Publishing Co., supra, 312 U.S. 426, 61 S.Ct. 693. The employer there had unlawfully refused to bargain with its union. The Board ordered the employer to cease and desist from refusing to bargain with the union. The Board then went further and broadly ordered the employer to refrain from violating the Act in any manner whatsoever. The Court found that the Board had overstepped its authority because "the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." Id., 312 U.S. at 433, 61 S.Ct. at 698. The Court particularly expressed concern that "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found." Id., 312 U.S. at 435, 61 S.Ct. at 699.

This Court expressed a similar concern about illegitimate exposure to the broad power of contempt proceedings in May Department Stores Co. v. NLRB, supra, 326 U.S. at 388-390, 66 S.Ct. at 210-212. In that case, the Board found that the employer had refused to bargain in good faith with its union and had interfered with its employees' rights. Rather than issue a cease and desist order tailored to

enjoin these types of practices in the future, the Board broadly ordered the employer to cease and desist from violating the NLRA in any other manner. The Court modified the Board's order and tailored the order to apply only to the actual violations found by the Board. Id., 326 U.S. at 392-393, 66 S.Ct. at 215. In reaching this decision, the Court established the standard for reviewing cease and desist orders issued by the Board.

> The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an Order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a). *** We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation .... 'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or the danger of their commission in the future is to be anticipated from the course of his conduct in the past.'

Id., quoting from NLRB v. Express Publishing Co., supra, 312 U.S. at 437, 61 S.Ct. at 700.

There is no doubt whatsoever that the Board can fully remedy each of the unfair labor practices that the Board found to have occurred in Beverly III without extending the Board's order beyond the location where unfair labor practices occurred. Prior to this consolidated litigation, the Board

routinely issued orders limited in scope to the particular facility at which an unfair labor practice allegedly occurred (see footnote 4, supra). These orders included appropriate cease-and desist provisions, notice-posting requirements at the applicable nursing home and other affirmative action such as reinstatement, backpay, or expungement of unlawful warnings from personnel files. Similarly, when the Board lost its effort to obtain a corporatewide order in Beverly I, the Board fully remedied the various unfair labor practices at the involved nursing homes with facility-specific orders of the same type that it had historically employed. Beverly California Corporation, supra, 316 NLRB 888. In its Beverly II order, the Board once again issued facility-specific orders that adequately and completely expunged all consequences of the unfair labor practices, and these orders have been enforced (App. C). The Board could readily accomplish the same with respect to the remaining 28 unfair labor practices at the nine nursing homes that are part of the Beverly III case.

The present case is different from cases in which an employer commits a single unfair labor practice that impacts employees at multiple locations, thereby warranting a cease and desist order that covers more than one location. For example, if an employer has a handbook that contains an overly broad rule that restricts an employee's ability to exercise NLRA rights, and if the handbook is distributed to employees at multiple locations, the effects of the unfair labor practice can only be expunged through a cease and desist order and notice-posting applicable at each location where employees have been impacted by the unfair labor practice. E.g., Service Merchandise Co., Inc., 299 NLRB 1125 (1990). In the present case, however, no unfair labor practice had an impact beyond the nursing home where the unfair labor practice occurred, and the Board did not find otherwise.

Similarly, in a series of cases involving an employer named J.P. Stevens & Co., Inc.,[8] the courts of appeals enforced numerous Board orders and ultimately even entered contempt findings against the employer for violating court orders. Eventually, the courts enforced Board orders which extended remedial relief beyond the locations at which unfair labor practices occurred. In each case, however, the courts did so because the Board's evidence established a "company-wide policy", J.P. Stevens & Co., Inc. v. NLRB, 623 F.2d 322, 327 (4th Cir. 1980) in which top level corporate officials personally committed unfair labor practices and then orchestrated a series of speeches at other company locations through which it sought a "to chill the ardor of employees for the Union by gloating about the Union's utter lack of progress at the organized plants, a lack of progress found here to be attributable to a resolve to defy the statute." J.P. Stevens & Co., 239 NLRB 738, 771 (1978), enf'd 623 F.2d 322 (4th Cir. 1980). See also, J.P. Stevens & Co., Inc. v. NLRB, 668 F.2d 767, 773 (4th Cir. 1982) ("high-ranking officials of [the Company] acted deliberately and with a directness of purpose in contravening unmistakable statutory guarantees and the spirit of the contempt order to frustrate the employee choice during that campaign.").

The Board's evidence in the present case does not come remotely close to establishing any unlawful company policy applicable to all nursing homes operated by Beverly. The record here shows that Beverly has a lawful written policy in place regarding its position on unionization (App. N), and the Board did not find this written policy to be

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[8] The litany of J.P. Stevens cases is best described in NLRB v. J.P. Stevens & Co., Inc., 563 F.2d 8, 13 (2d Cir. 1977).

unlawful.[9] Unlike the employer in the J.P. Stevens line of cases, Beverly has routinely worked well with a number of unions and has in place more than 100 labor contracts covering approximately 10% of its nursing homes (App. A at 47a). Beverly never took unlawful conduct at one location and boasted about it at another location in an effort to chill union organizing activity.

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[9] On the contrary, the Board found Beverly's written policy to be lawful but found that "the lawfulness of such a general policy does not insulate an employer" from findings that its conduct has gone beyond the limits of its stated policy. (App. G at 428a). The only other portion of the Board's two decisions that mentions Beverly's written policy is the Administrative Law Judge's decision in Beverly II (App. F at 391a). The Board found it unnecessary to address the Judge's findings of fact regarding the written policy since the Board did not issue a nationwide order in Beverly II. Moreover, the Judge did not find the written policy to be unlawful. Nonetheless, he misquoted from the policy in his decision and omitted material language in a manner that misrepresents the content of the policy. For example, while the policy states that "the Company policy is to **foster** a pro-associate relationship in a non-union environment whenever possible" (App. N), the Judge quoted the policy as being to "force" a pro-associate relationship in a non-union environment whenever possible. Forcing would be unlawful, where as fostering is lawful. The Judge also conveniently omitted the next two critical sentences of the policy which state: "In those facilities where the associates have elected union representation, management will establish and promote a sound business relationship with the union. All labor relations policies, procedures and practices shall be in compliance with all Federal and State Labor Laws and Regulations" (App. N). The Judge similarly omitted an important sentence stating that if facility's responsibility was to "promote a sound business relationship with the union where a bargaining unit is certified." (Id.). The Board properly ignored the Judge's mischaracterization of record evidence.

Moreover, no corporate official committed an unfair labor practice other than the single incident in which the Board found that Director of Associate Relations Roger Brown wrongfully suspended an employee. That employee had, by her own admission, interrupted a management meeting six times to voice her pro-union sentiments (App. L), even though she had been told that questions were not permitted at the meeting and even after she was warned that further interruptions may lead to suspension (Id.). Brown's isolated conduct in this one meeting cannot, standing alone, serve as the basis for finding the existence of a "company-wide policy" to commit unfair labor practices. C.f., Dayton Bd. of Education v. Blindman, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775 (1997) ("only if there has been a systemwide impact can there be a systemwide remedy"); Lewis v. Casey, 518 U.S. 343, 359-360, 116 S.Ct. 2174, 2184 (1996) (same).

The critical point in the J.P. Stevens line of cases is that the Board's order needed to be extended to other locations because the record showed that employees at those other locations knew about the unfair labor practices that were occurring elsewhere and because those unfair labor practices were indisputably discouraging those employees from exercising their rights under the NLRA. There is no such evidence in the present case, and extending the cease and desist and notice-posting provisions to nursing homes where no unfair labor practices have ever occurred plainly exceeds what is necessary to dissipate the effects of the existing unfair labor practices.

Boiled down to its essence, the evidentiary basis for the Board's Order hinges almost entirely upon the numerical percentage of nursing homes at which unfair labor practices have occurred. The Beverly I litigation involved 33 facilities over a three-year time span, and the Court of Appeals for the Second Circuit correctly found that the problems at 3% of Beverly's then-existing nursing homes did not justify

imposing remedial provisions at the 97% of nursing homes where no unlawful conduct had occurred. The Beverly II proceeding added 16 homes[10] over the course of the next three years, and the Beverly III proceeding included 9 more homes over the succeeding two years. Even when all three cases are combined, the number of nursing homes involved in this aggregated litigation represent only 6% of Beverly's nursing homes over a six year period. This average of 1% per year, while not ideal, is not unexplained since even the Board acknowledges that: (1) Beverly was "the subject of substantial efforts at organizing its employees by various unions" (App. G at 593a) during that timeframe as part of a corporate campaign by the unions; and (2) the General Counsel stockpiled every allegation against Beverly during this timeframe while refusing to allow the settlement of any charge (Id.).

The unfair labor practices from Beverly I have been fully and adequately remedied. 316 NLRB 888. The same is tree for the unfair labor practices in Beverly II (App. C). A nationwide order is not necessary in order to fully remedy the remaining unfair labor practices found by the Board in Beverly III. The obvious purpose of a nationwide order is to punish Beverly by putting uninvolved nursing homes at risk of future contempt proceedings, and this purpose exceeds the Board's statutory authority under Section 10(c).

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[10] While the Board originally found violations at 16 homes, the Court of Appeals dismissed all allegations involving Wyoming Valley (App. A at 19a-21a).

CONCLUSION

The writ requested should issue because: (1) the word limitation imposed by Judge Wood raises an important issue implicating this Court's supervisory authority over the Court of Appeals; and (2) the Board's corporate-wide cease and desist order and notice-posting requirement raises an important issue regarding the administration of the NLRA and the scope of the Board's remedial authority under Section 10(c).

Respectfully submitted,

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In the
Supreme Court of the United States

Beverly California Corp.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX (Volume I)
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

The United States Court of Appeals for the Seventh Circuit

[Filed September 13, 2000]
Nos.98-3177, 98-3683, 98-3721,
99-1097, 99-1124, 99-1382

BEVERLY CALIFORNIA CORP., f/k/a BEVERLY ENTERPRISES, *Petitioners/Cross-Respondents,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent/Cross-Petitioner.*

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and DISTRICTS 1199P and 119911, SEIU, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions for Review and Cross-Applications for Enforcement of Orders of the National Labor Relations Board. Nos. 6-CA-20188-46, *et al.*

ARGUED OCTOBER 26, 1999
DECIDED SEPTEMBER 13, 2000

Before HARLINGTON WOOD, JR., KANNE, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, *Circuit Judge*. Beverly California Corporation operates nursing homes all over the United States--approximately 900 at the time the labor practices at issue in this appeal occurred. It is avowedly anti-union, and its practices have drawn the attention of the National Labor Relations Board ("the Board") on no less than five occasions over the last decade or so. Before us in the present appeals are the Board's orders in *Beverly California Corporation,* 326 NLRB No. 29 (1998) *(Beverly II),* and *Beverly California Corporation,* 326 NLRB No. 30 (1998) *(Beverly III),* in which the Board largely adopted the findings of two different administrative law judges (ALJ) that numerous violations of the National Labor Relations Act ("the Act") had occurred at various facilities Beverly operates, and in which the Board ordered various forms of corporate-wide relief. In its petition for review, Beverly contests many of these findings, as well as the Board's chosen remedy. The Board has cross-petitioned for enforcement of its orders. Finally, the Service Employees International Union (SEIU) has petitioned to contest the Board's exoneration of Beverly in certain instances and its failure to issue a bargaining order at one facility.

As we explain in slightly greater detail below, the pertinent question for this court is whether the Board's

decisions are supported by substantial evidence. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474,487-88 (1951). With respect to the remedy that the Board chose, our review is also quite deferential. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). In that light, we conclude that all but a few parts of the Board's orders are entitled to enforcement. We further conclude that the Board did not abuse its discretion in principle in imposing a corporate-wide remedy, but that it needs to refine the corporate-wide aspects of the remedial order and distinguish those from the parts more suitable to application at the facility level.

I

Beverly's corporate headquarters are now in Arkansas. At the time of *Beverly II* and *Beverly III* it operated 895 nursing homes throughout the United States. It used (and as far as we know still uses) a typical three-tier organizational structure, moving from the corporate level through the regional, and then down to the individual facilities. Beverly formulates its labor relations policy at the corporate level; personnel at the regional level bargain with unions over contracts and high level grievances. Each facility's own managers are responsible for day-to-day activity at the facility, and they handle front-line labor relations. Facility managers report to regional "area managers," who in turn report to the operations officials at headquarters.

In 1993, the Board found that Beverly had committed various unfair labor practices at 33 of its nursing homes, between 1986 and 1988. It issued a corporate-wide cease and desist order, which provided that Beverly should not violate the Act, which specified the ways in which Beverly had committed violations in its various facilities, and which

imposed a requirement that the cease-and-desist order should be posted at every one of its facilities. *Beverly California Corporation,* 310 NLRB 222 (1992) *(Beverly I).* On appeal, the Second Circuit concluded that the order was too broad, given the nature of the violations the Board had found, and that it did not reflect the reality of the company's central control (or lack thereof) over the facilities. *Torrington Extend-A-Care Employee Ass'n v. NLRB,* 17 F.3d 580 (2d Cir. 1994).

Before *Beverly I* was finished, the General Counsel of the Board issued a new consolidated complaint on August 20, 1991, charging Beverly with violations at another group of nursing homes (eventually, 17 facilities). ALJ Peter E. Donnelly held hearings on those matters on various dates between November 12, 1991, and March 26, 1993. In an opinion issued on June 29, 1994, he found that (1) Beverly and its nursing home operating divisions, regions, wholly-owned subsidiaries, and individual facilities constituted a single integrated business operation and a single employer, (2) Beverly had committed many unfair labor practices as charged, although in a nontrivial number of instances the General Counsel had failed to prove the alleged violations, and (3) a corporate-wide cease and desist order and a requirement of posting notices in every facility that detailed forbidden practices was called for. See 326 NLRB No. 29, attachment at 22-85. On appeal to the Board, most of ALJ Donnelly's decision was upheld, although the Board found that some of the charges he had rejected should have been sustained. With respect to remedy, it coordinated its decision with the resolution of *Beverly III.*

This was possible because, while *Beverly II* was working its way through the system, proceedings in *Beverly III* had begun. On June 30, 1993, the General Counsel issued

a complaint in that matter, and ALJ Lawrence W. Cullen held hearings between November 30, 1993, and April 27, 1994, on charges pertaining to 11 more nursing homes in several different states. In a decision of June 12, 1995, ALJ Cullen also concluded (upon independent consideration) that Beverly was a single employer, and he upheld many (though not all) of the charges. He too recommended a corporate-wide cease-and-desist order, a posting requirement, and detailed individual relief. 326 NLRB No. 30, attachment at 51-53. On appeal, the Board also upheld the bulk of ALJ Cullen's decisions, again with a few disagreements. It also approved the system-wide orders that both ALJ Donnelly and Cullen thought were necessary: it did this through the vehicle of a single order entered in *Beverly III,* to which the decision in *Beverly II* referred. (Although orders later than *Beverly III* are not before us, we note that two more proceedings have taken place in which ALJs have found that Beverly committed similar violations: *Beverly Health and Rehabilitation Services, Inc., et al.,* JD-204-97 (Nov. 26, 1997) *(Beverly IV);* and *Beverly Health and Rehabilitation Services, Inc.,* JD-40-00 (March 23, 2000) *(Beverly V).*)

On August 28, 1998, Beverly petitioned for review of both *Beverly II* and *Beverly III* in the Fourth Circuit; SEIU petitioned for review in the Third Circuit and in this court. The Judicial Panel on Multidistrict Litigation ("the Panel") consolidated the petitions in *Beverly II* before the Third Circuit, and in *Beverly III* before this court. See 28 U.S.C. § 2112(a)(3) (conferring this responsibility on the Pane]). The Third Circuit then granted Beverly's motion to transfer *Beverly II* to this court. The Board filed cross-applications for enforcement.

II

A. Breadth of the Case

Before turning to the specifics of the appeals before us, a word about the scope of this case is necessary. At every step of the way, Beverly has in one way or another argued that this case is just too big to manage: the Board should not have consolidated the General Counsel's charges with respect to the various nursing homes for disposition; the geographic scope is too broad; and there are too many specific alleged problems at individual facilities to make consolidation efficient. Before this court, Beverly has complained bitterly about the page limits that were imposed upon its briefing, despite the fact that we allowed it to file a brief 40% longer than the rules normally permit. Finally, a central part of Beverly's argument on appeal is its attack on the corporate-wide order that the Board approved in *Beverly III* to address both cases.

These complaints are related to one another. We explain here why we find them to be without merit. A key point underlying the Board's approach to these cases is its finding--uncontested in *Beverly I,* but made over Beverly's opposition in *Beverly II* and *Beverly III--that* Beverly is a single employer, a single integrated enterprise with a unified labor relations policy. ALJ Cullen found the evidence on this point to be overwhelming, and we agree. (Indeed, Beverly has not challenged this finding on appeal; we mention the point for purposes of giving perspective to the broader issues it has raised, not because we are reconsidering the correctness of the finding.) ALJ Cullen relied on Beverly's hierarchical management structure, its decision to limit the authority of area and individual facility managers by overall corporate

standards, its central oversight of labor relations functions in particular, the fact that labor grievances bump up to the regional level at step three, the fact that Beverly dispatches regional human resources personnel to individual facilities the minute a union organizational effort begins, and other evidence to the same effect.

Viewed in this light, and also taking into account the mounting evidence that Beverly facilities continue to violate the law with regularity, it is hardly surprising that the Board would have considered corporate-wide relief to be appropriate. When an employer has many different facilities, all of which are affected by the same general policies, the Board is not required to proceed facility-by-facility, waiting for the next shoe, and the next shoe, to drop. It can instead require the company as a whole to eliminate the policies that lead to the commission of unfair labor practices by managers lower down on the corporate ladder. That is not to say, of course, that any particular corporate-wide order is justified or not, and we consider the one that the Board imposed here later in this opinion. But in principle, this is a tool that the Board is entitled to use. See *J.P. Stevens & Co.*, 245 NLRB 198, 199 (1979), *enforced*, 638 F.2d 676 (4th Cir. 1980); *Florida Steel Corp.*, 222 NLRB 955, 956 (1976), *enforced mem.*, 536 F.2d 1385 (5th Cir. 1976). Nothing in *Torrington Extend-A-Care, supra,* is to the contrary; in that case the Second Circuit merely found that the record as of the time of *Beverly 1* did not support corporate-wide relief.

There is no doubt that when corporate behavior as a whole is challenged the record will often contain myriad individual facts that add up to create the case as a whole. This phenomenon is not limited to labor law: mass tort claims, consumer fraud claims, and environmental claims can also involve many particularized injuries, forms of fraud, or

polluted sites. But the fact of evidentiary detail is not something that prevents consolidation of proceedings, either before administrative agencies or before courts. The Panel regularly sends complex cases to a single district court for pretrial processing. The transferee court manages the litigation by creating committees of counsel, by imposing strict discovery limits, by establishing deadlines, and by using the other tools of the trade. Here too, that is what happened both before the Board and before this court. The pressure of a large complex proceeding puts a premium on good organization and efficient use of time and space, but that is a good thing, not a bad thing. Consolidation allows for consistency in decisionmaking; it allows both the agency and the reviewing court to see the big picture and not to be misled by fragmentation; and it saves resources for all concerned.

Here, both the Board and Beverly had to present their appeals under the same rules: the same page limits and the same standard of review. Even when it filed its brief, Beverly was apparently under the misapprehension that more is always better when it comes to briefing. It complained, for example, that the page limits imposed by this court precluded it from listing every issue pertaining to each of 42 nursing homes in its statement of the issues, and instead "forced" it to offer what it gave us: the concise and helpful statement that it was challenging whether substantial evidence supported the Board's findings in numerous respects. A listing of all those issues would only have made the brief tedious to read, because everything would have been repeated later in the brief in the discussion on the merits. Furthermore, the substantial evidence standard of review should guide appellate counsel in the selection of issues that deserve presentation to the court of appeal. Arguments to the effect that the ALJ should not have found certain witnesses to be credible are, to put it bluntly,

almost never worth making. In short, given the scope of this case and the kinds of arguments this court is entitled to consider, the case was manageable within the limitations we imposed.

B. Questions Presented

Having disposed of Beverly's complaints related to the general scope of the case, we turn to the substantive questions each of the parties has presented on appeal. Beverly raises three basic points: first, as noted, that there are 42 findings of unfair labor practices contained within *Beverly II* and *Beverly III* that are not supported by substantial evidence; second, that the Board erred in *Beverly III* by imposing a cease-and-desist order on all 895 of its facilities rather than just the 27 facilities where violations occurred; and third, that the Board erred in *Beverly III* by ordering Beverly to post remedial notices at all 895 of its nursing homes, rather than simply posting notices at individual homes that addressed the individual violations thru occurred there. SEIU's appeal concerns three particular nursing homes and the remedial order in *Beverly II:* it claims that the Board should have issued a bargaining order against Beverly to remedy the unfair labor practices it found at the East Moline Care Center; that the Board should have found that employee Dorothy Theunick was discharged by East Moline based on her union activities; that it should have found that Beverly withheld a scheduled wage increase at Richland Manor based on the employees' refusal to withdraw an unfair labor practice charge; and that there should have been a separate nationwide remedial order entered in *Beverly II.* The Board defends its orders in all respects and seeks enforcement of them.

C. Standard and Scope of Review

We have already alluded to the fact that our review of the Board's decisions is deferential. The Act itself makes the point clearly by specifying that [t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." NLRA § 10(e), 29 U.S.C. § 160(e). "Substantial evidence," the Supreme Court has explained, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See also *American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 817 (7th Cir. 1999) *(en banc)*. Thus, as long as there is "substantial" evidence in the record supporting the Board's opinion, it does not matter that there is also evidence in the record that might support Beverly's or SEIU's view of the case. Furthermore, as we pointed out in *NLRB v. Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999) *(en banc)*, we defer to the Board's interpretation of the statutes it is charged with administering un]ess its view is arbitrary or capricious. *Id.* at 666. Adding into the balance the fact that we will virtually never second-guess a basic credibility determination, it is clear that those who challenge the Board's determinations have a difficult task in front of them.

Before turning to a more detailed discussion of the facilities at issue in the Board's two proceedings, we wish to make two points. First, a review of the two ALJ opinions on which the Board relied demonstrates clearly that each ALJ carefully reviewed the evidence before him before finding the violations that he did. On numerous occasions, each ALJ concluded that the General Counsel had supported some of the charges and had failed to support others. A few examples

suffice to illustrate this point. One charge made in *Beverly II* pertained to the discharge of Gladys Hahn, who worked for a period of time at the Mark Twain Hospital Facility in San Andreas, California. Hahn was unhappy about the way that the managers of Mark Twain handled the supply system, and the managers instructed her not to involve other employees in her complaints about that system. The General Counsel alleged that this violated §§ 8(a)(1) and (3) of the Act, but the ALJ found the charge unsubstantiated, largely because he found that Hahn was a supervisor not entitled to protection under the Act. 326 NLRB No. 29, attachment at 37-40. Also in *Beverly II,* the ALJ considered a variety of charges relating to the Slayton Manor Nursing Home, in Slayton, Minnesota, including allegations that management posted an unlawful no-solicitation rule, solicited and adjusted employee grievances, created the impression of surveillance, and threatened some employees with discipline for speaking about the union or failing to support Beverly's position against the union's organizational efforts. The ALJ found that the threats of discipline did not violate the Act, because the threatened nurses were supervisors; that the no-solicitation rule did violate the Act; that the facts did not show that an impression of surveillance was created; and that a manager had improperly solicited and adjusted employee grievances during an election campaign. 326 NLRB No. 29, attachment at 4647. The discussions ALJ Cullen gave with respect to the William Penn facility in Lewiston, Pennsylvania, 326 NLRB No. 30, attachment at 13-15, and with respect to the Deltona Health Care Center, Deltona, Florida, *id.* at 18-24, are similarly balanced. And these are just examples. No one was receiving rubber-stamp treatment in these cases.

The second point is that, as the Board has pointed out in its brief, Beverly has not challenged a significant number

of the Board's findings of particular violations at particular facilities. We summarize them here:

- Slayton Manor Nursing Home: violation of § 8(a)(1), overbroad no-solicitation rule.

- Sanger Hospital: violation of § 8(a)(1), coercion and threats to employee Garza.

- Duke Convalescent Facility: (a) violation of § 8(a)(1), threats of discharge to prounion employee Johnson; (b) violation of §§ 8(a)(1) and (3), from warning, suspending, and then discharging Johnson; (c) violation of § 8(a)(1), removal of union materials from facility.

- William Penn Nursing Center: violation of § 8(a)(1), oral harassment of prounion employee Black.

- Deltona Health Care Center: various violations of § 8(a)(1), including threats of loss of licenses and jobs for engaging in union activity, interrogations, and impression of surveillance.

- East Moline Care Center: several violations of § 8(a)(1), including threats to sell rather than face unionization, threats to call police for lawful hand-billing, and interrogation.

- Garden Terrace Nursing Center: violations of § 8(a)(1) by interrogation, impression of surveillance, threats of layoff, and permitting only anti-union campaigning on election day.

- Gulf Coast Convalescent Center: violations of § 8(a)(1) by interrogation of employee Rogers, and by prohibiting employees from wearing union insignia while allowing other kinds of pins.

- Mount Lebanon Manor Convalescent Care Center: violation of § 8(a)(5) by failing to furnish relevant bargaining unit information to union.

- Danbury Pavilion Health Care Facility: violation of § 8(a)(5) by unilaterally ceasing to pay "short pay" to nurses.

- Beverly Health Care Center: violation of § 8(a)(1) by telling two employees they would be discharged if they refused to cross a picket line and joined a strike; violation of § 8(a)(3) by promising one employee that disciplinary warnings would be rescinded if she stopped participating in the strike, and then discharging her when she refused.

- Carpenter Care Center: violations of §§ 8(a)(5) and (1) by unilaterally changing a medication reimbursement procedure and by refusing to furnish information to the union.

- Valley Care and Guidance Center: violations of § 8(a)(1) in various ways, including soliciting an employee to sign a decertification petition, interrogation, and demanding loan repayment.

The Board argues, and we agree, that Beverly has waived its defenses to these findings and that it is entitled to summary enforcement with respect to them. As established findings, furthermore, these form part of the background against which we will assess the remedy.

III

We now turn to a brief discussion of the unfair labor practices the Board found at each facility. The background legal principles are well established. Section 7 of the Act gives employees the rights of "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. Section 8(a), to which we have already referred a number of times, defines certain practices that are forbidden to an employer because they would interfere with the employees' § 7 rights. Thus, § 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their § 7 rights. 29 U.S.C. § 158(a)(1). Section 8(a)(3) makes it illegal for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(a)(4) makes it an unfair labor practice for an employer "to

discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in proceedings related to the Act. 29 U.S.C. § 158(a)(4). Finally, § 8(a)(5) makes it illegal for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).

A. Instances Where Evidence Is Lacking

We have carefully reviewed the administrative record and have found, for the most part, that the Board's findings in both cases are supported by substantial evidence. In three instances, however, we have concluded that particular findings must be reversed. We review these first, before turning to our consideration of the facilities and findings that we believe do not require revisions.

1. *Stroud Manor* (Beverly II)

With respect to Stroud Manor, the General Counsel's complaint alleged that Beverly had violated § 8(a)(1) as follows:

> . . . by soliciting employee complaints, threatening employees, and promising benefits and improved terms and conditions of employment to Respondent's employees if they rejected [the Union] as their collective-bargaining representative; promising to redress an employee's grievance concerning tuition reimbursement; threatening employees with less favorable working conditions if they selected the Union as their bargaining representative; threatening employees that

> Respondent would no longer grant favors if the employees selected the Union as their bargaining representative; and threaten[ing] employees with less favorable working conditions if they selected union representation by telling the employees that an entire day must be requested if the employee has a medical appointment during the workday.

326 NLRB No. 29, attachment at 73.

The ALJ upheld some of these allegations and rejected others. He found, and the Board agreed, that Jay Begley and Greg Thomas, regional human resources representative for Beverly, promised to fix a tuition reimbursement problem for employee Jeanette Drake, and did so with the assistance of facility administrator Mary Lou Shannon. He further found that under the circumstances, "when Drake was approached by Shannon during the election campaign with a promise to expedite this payment, such remarks violate[d] Section 8(a)(1) of the Act." *Id.* at 74. The ALJ also found other forbidden promises of benefits during the campaign that violated section 8(a)(1). On the other hand, he rejected the charge that a letter dated July 23 that Shannon distributed that urged employees to vote against the Union constituted an unlawful threat of less favorable working conditions if the union won. He rejected the claim that the director of nursing, McGonnigle, unlawfully threatened employee Jimenez with less favorable working conditions by telling her she would need a full day off for medical appointments. He found a violation of § 8(a)(5) established in the facility's withholding of all wage increases for the year 1992 without notice to the Union, in contravention of its practice in years past.

While most of these findings, both pro and con, are supported by the evidence, we agree with Beverly that Begley (as opposed to Thomas and Shannon) did not make an improper promise or take improper action with respect to Drake's tuition reimbursement problem. All Begley did was to hold a meeting with the licensed practical nurses (LPN) to explain Beverly's position against the Union. He compared the salaries the LPNs were making with those that LPNs working at unionized facilities earned. He then asked for questions, and Drake responded with her inquiry about why Stroud Manor was taking so long to reimburse employee tuition bills. Begley replied that the time lags were because of the company's financial problems, but that its situation was stabilizing and he thought the speed of reimbursements should improve.

The ALJ saw this as the solicitation of grievances, which raised a rebuttable presumption of a violation of § 8(a)(1). But employers are allowed to conduct anti-union campaigns if they wish. See NLRA § 8(c), 29 U.S.C. § 158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *BE & K Const. Co. v. NLRB*, 133 F.3d 1372, 1376-77 (llth Cir. 1997). The only thing that is forbidden is an unlawful coercive promise or threat. Employers are also permitted to offer opinions about matters that are not within their control, because those statements are unlikey to be perceived as threats or promises. See *Gissel*, 395 U.S. at 618. Here, both sides agree that Begley merely made a general statement about the condition of the company. We do not see in his response the kind of "promise" of help with Drake's own tuition problem that is forbidden. Shannon, of course, is another matter. The ALJ found as a fact that Shannon affirmatively sought out Drake, told her she would look into the delay, did so, and promised Drake she would have a check

within two weeks. But Begley did no such thing, and we find that the Board had no other substantial evidence on which to base a conclusion that Begley's actions constituted a separate violation of § 8(a)(1).

Beverly also challenges the finding of a violation of § 8(a)(1) with respect to Thomas's conversation with Drake. Unlike Begley, however, Thomas was conducting one-on-one meetings with the LPNs. In these meetings, he introduced himself, explained the company's position, encouraged them to vote, and asked if they had any questions. When he gave Drake this invitation to speak, she raised the tuition problem with him. Thomas testified that "he may have told Drake he would look into it for her, but has no recollection of doing so except to the extent that he may have mentioned it to Mary Lou Shannon, the administrator at the facility." 326 NLRB No. 29, attachment at 73. That is, however, a rather large exception, given the fact that it was the very next day that Shannon approached Drake about the problem. In our view, this is enough to distinguish Thomas's case from Begley's, and enough to support the ALJ's conclusion that Thomas was promising a specific benefit.

Last (for Stroud Manor), Beverly argues that the Board erred in finding a violation of § 8(a)(5) in the failure to give the employees a wage increase while negotiations were taking place. It attempts to refute the finding that Stroud Manor/Beverly had established a pattern of annual wage increases by showing that in 1989 it gave 3%, in 1990 it gave 40 cents across-the-board in March and another 30 cents across-the board in September, and in 1991 it gave a 4% anniversary raise. This evidence tends more to support the ALJ's conclusions than to undercut them, in our view, even though the 1990 figures are not expressed in percentage terms. We reject its challenge to this finding.

2. *Wyoming Valley* (Beverly II)

The charges with respect to the Wyoming Valley facility pertained only to its treatment of Christopher Tausch, an employee who was an acknowledged "colonizer," or union activist who had taken the job solely for the purpose of helping to organize the workforce. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995); *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999). At the time he was hired as a nurse's aide, Tausch did not disclose his union identity to Beverly and he lied about his level of education on his application (he was in fact a 1990 graduate of Rutgers University with a scholastic concentration in labor studies). It was his intention to obtain the names, addresses, and telephone numbers of the Wyoming Valley employees in order to solicit them in the Union's organizing effort.

On the evening of March 27, 1991, during a work break, Tausch went into the kitchen area of the dietary department. While there, he first spoke with employee Charles Weitz about the Union and asked Weitz for the names and addresses of two other dietary employees. Weitz told him that the information was on a list located in the office of the department manager, Richard Rutkowski, who was absent at that time. Tausch went into Rutkowski's office, sat down at his desk, and copied from a list taped to the wall the names and telephone numbers of the people he wanted to solicit. Later that night Rutkowski returned, and Weitz reported to him that "a nurse" had been in his office writing down telephone numbers. The next day, Tausch and another person visited Weitz at his home and asked for his personal support for the Union and his help in soliciting others. Weitz was not interested; at that point, Weitz revealed to Rutkowski that "the nurse" was Tausch and he complained about being bothered.

Rutkowski consulted with his supervisor, Nancy Wilson, about what to do. Wilson kicked the problem up to the facility administrators, and the head administrator, Donna Connery, decided that Tausch should be terminated for unauthorized entry into the restricted dietary department area and for removing confidential employee information (i.e., the telephone numbers and addresses) from the premises. As a precaution, Connery also notified Wayne Chapman, Beverly's regional director for human resources, of what she planned to do; Chapman concurred in her decision.

The ALJ found (correctly anticipating the Supreme Court's decision in *Town & Country Electric)* that Tausch was an "employee" under the Act notwithstanding his status as a paid union organizer. 326 NLRB No. 29, attachment at 56. He concluded, however, that Tausch's activity was not protected and thus that his discharge did not violate §§ 8(a)(1) and (3). The Board reversed the ALJ on this point, finding that the telephone numbers were not "confidential" (because they were available out in the open by the nurses' station), that the confidentiality rationale for firing Tausch was thus pretextual, and that he was really fired because he was engaging in union activities. 326 NLRB No. 29, at 3-4.

We agree with Beverly that the ALJ got this one right. It is of course true that an employer violates § 8(a)(3) by retaliating against employees for engaging in union activities. See, *e.g., NLRB v. Louis A. Weiss Memorial Hosp.,* 172 F.3d 432, 442 (7th Cir.1999). But an employer does not violate the statute if it can show that it would have taken whatever action it took for legitimate reasons, whether or not the employee in question had engaged in union activities. *Id.* Here, it is undisputed that Tausch did *not* obtain the telephone numbers and addresses in an open and unobjectionable way, such as by copying them from an employee directory available to

everyone, or even by sitting down at the quasi-public nurses' station and writing them down. Instead, he sneaked into Rutkowski's office when Rutkowski was away, jotted them down, and slipped away again. Beverly was entitled to take into account the totality of the circumstances surrounding Tausch's behavior. There is no evidence at all to suggest that it would have tolerated this behavior from committed union opponents. In our view, therefore, the Board had no evidence upon which to rest its reversal of the ALJ's conclusion here, which was based on the ALJ's own opportunity to observe the witnesses and to make credibility assessments. The conclusion that Beverly committed violations at Wyoming Valley must therefore be reversed, as there was nothing other than the Tausch incident at stake.

3. *Duke Convalescent Facility* (Beverly II)

This was another facility for which the General Counsel brought a substantial number of charges. Some of the Board's findings of violations, as noted above, are not challenged on appeal: (1) administrator Eigen violated § 8(a)(1) when he threatened prounion employee Amy Johnson with discharge; (2) Eigen and regional human resources representative Martinez violated §§ 8(a)(3) and (1) by warning, suspending, and ultimately discharging Johnson; and (3) food service manager Pereira violated § 8(a)(1) by removing Union paraphernalia from the facility.

Beverly does, however, challenge other aspects of the Board's findings with respect to Duke Convalescent. First, it contests the Board's finding (reversing the ALJ) that Steve Marek, a labor consultant Beverly had hired to assist management at the facility, violated § 8(a)(1) when he spoke to Valerie Faulkner and Harry Brooks, two known Union

sympathizers, about what they thought a union would do and (in Brooks's case) how he was going to vote in the election. The ALJ had concluded that these conversations were protected, on the ground that there was nothing coercive or improper in asking these questions to open Union sympathizers. See *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir.1985) (affirming *Rossmore House*, 269 NLRB 1176 (1984)). The Board explained its reversal of that finding by the fact that even open union adherents can be subjected to invalid coercive interrogation (a proposition that *Rossmore House*, on which Beverly principally relies, also acknowledges). An employer is not free to probe "directly or indirectly into [an employee's] reason for supporting the union." *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981). If an interrogation is "coercive in nature" it makes no difference that the attempt at coercion was not successful. *Id.;* accord *NLRB v. Brookwood Furniture*, 701 F.2d 452, 463 n.35 (5th Cir. 1983). While we agree with Beverly that this is a close point, we think the Board--which was able to consider the actual remarks made to these employees--had evidentiary support for its conclusion and thus we have no basis on which to reverse it.

Beverly's second challenge relating to Duke Convalescent relates to the section 8(a)(1) finding based on administrator Eigen's statement to Faulkner that she had missed a meeting in which employees were reminded that speaking about Union activity was prohibited in front of residents or on the nursing floor and that it had to be restricted to the break area. He also told her in the same conversation that he would not tell her how to vote, even though he knew where she stood. Eigen denied making these statements, but the ALJ chose to believe Faulkner's account

and it is on that basis that we evaluate the charge. The ALJ found, and the Board agreed, that this was enough to create the impression of surveillance in Faulkner. He also found that the restriction of organizing to the breakroom was unlawful because it limited such activity to a greater extent than was permissible under the law.

As Beverly did in its brief, we take the two points separately: surveillance, and undue restriction of areas for organizing. We agree with Beverly that the conclusion that Faulkner would have thought she was under surveillance finds no support in the evidence. The ALJ wondered how Eigen would have known she was pro-union if surveillance had *not* been underway, but he provided the answer to his own question later on in his opinion: "In reviewing the record, it is clear that Faulkner was among the most active and vocal of the union supporters and that her union sentiments were well known to management, including Eigen and Leonard." 326 NLRB No. 29, attachment at 63. The Board's only response to this problem in its brief is to suggest that Eigen did not know Faulkner was an active Union supporter at the time he approached her, and thus she could only have concluded that she was under surveillance. But there is no serious evidence to support that hypothesis, and speculation does not amount to substantial evidence. The ALJ found that Faulkner was an active Union supporter "from the beginning of the Union's organizational effort in early January 1991," *id.* at 62, which would mean that her Union identification would have been known by January 26, 1991, when the conversation with Eigen took place. *Id.* at 61. We therefore agree with Beverly that the evidence does not support a finding that the company violated § 8(a)(1) by creating the impression of surveillance in Faulkner.

Evidence does support the other part of the Board's finding, however, which was that Eigen's advice on where organization activities could take place was too restrictive. Indeed, Beverly itself seems to concede this in its brief, when it dismissively states that Eigen cannot be criticized for "[h]is failure to meticulously identify each and every non patient-care area." Beverly Brief at 32 n.11. But it is clearly one thing to tell the employees that they must keep their organizational activities away from the patients, and another to tell them that only the breakroom is available. Patients did not have access to locker rooms, the kitchen, or "med rooms," and the employees therefore had the right to engage in organizational activities there as well. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 506-07 (1978).

Of the other violations the Board found at Duke Convalescent, the only one Beverly challenges is the finding that it violated § 8(a)(3) by requiring Faulkner to obtain a doctor's note before she returned to work, when she had experienced one bout of nausea early in her pregnancy. Despite the fact that her doctor gave her a note saying that she could work until her first prenatal visit, assistant director of nursing Leonard refused to put her on the schedule until she obtained a formal medical certificate. His ostensible reason was concern for her baby, but the evidence showed that other employees were able to work during pregnancy without being required to furnish certifications. Furthermore, Faulkner left only once because of nausea. The Board was entitled to treat this action as discriminatory and the explanation as pretextual.

B. Other Facilities

Our discussion of the Board's findings at the remaining facilities will be briefer. We find that substantial

evidence supports its conclusions with respect to these locations, and we refer those who would benefit from a more complete discussion of the evidence to the opinions of the Board and the attached opinions of the two ALJs.

1. *Pioneer Place* (Beverly II)

At Pioneer Place, management decided to create an employee council that was to be composed of employees and managers. Section 8(a)(2) of the Act declares that it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. 29 U.S.C. § 158(a)(2). Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5).

Under this definition, the Board could reasonably have concluded that the council would constitute a labor organization. There was evidence that (1) the unit employees were going to participate in the council, (2) the council was to have existed at least in part for the purpose of dealing with the employer, and (3) those dealings would have concerned "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1158 (7th Cir. 1994). Furthermore, the Board could have concluded that the council would be under Beverly's domination, because it was the creature of the facility's management.

2. *Fountainview Place* (Beverly II)

On the day before a representation election, Beverly's human resources representative contacted the union organizer, Kidwell, to find out which employees would be the designated Union observers for the election. Kidwell did not identify them by name, but he did say that there would be one aide on each of the two shifts. In fact, it was Nurse's Aides (NA) Lillie Davis and Kastle Gannon who acted as Union observers. As a result, they were tardy in reporting to their workstations on the day of the election. Nothing was said to them at the time, but facility management disciplined them four days later. The Board found that the discipline was based on anti-union animus and thus violated § 8(a)(3). The record also showed that Beverly knew why these two were late.

Beverly makes much of the fact that Kidwell only stated two "aides" would act as observers; he did not specify that the observers would be NAs. However, as the ALJ correctly noted, Fountainview's Director of Nursing testified that she knew the day prior to the election that two NAs would be used as observers. 326 NLRB No. 29, attachment at 27; Beverly Supp. App. at 32. Therefore, Kidwelt's precise wording is irrelevant. Beverly also argues that it needed to know the aides' precise identities before their absence, so that it could prepare adequately. But it did not say this to Kidwell when he responded to the inquiry, nor did it explain why it was not enough to know that a couple of NAs were going to be a little late reporting for duty. Substantial evidence supported the Board's finding of a violation.

Beverly also challenges the Board's finding that Joyce Williams, a member of Beverly's labor relations staff, made a threat against Lillie Davis on the day of the Union election. The ALJ credited Davis's unrebutted testimony as to the

content of Williams's remarks, and found that, taken in context, the remarks amounted to "unspecified threats of reprisal." 326 NLRB No. 29, attachment at 28. The ALJ was entitled to make these credibility determinations, and we will not disturb them.

3. *Liberty House Nursing Home* (Beverly II)

Peggy Urban, a long-time employee and active Union participant, was discharged after a new employee claimed that she saw Urban hit a patient. Urban had cared for the patient for some time, and there was substantial evidence before the Board tending to show that the patient held Urban in high regard. Upon investigation, there was no evidence of physical abuse on the patient, and the patient herself could not confirm that she had been hit (though she was not in full command of her faculties). Urban denied any abuse, and another aide (Nicely) backed up her account to the extent of confirming that there was no slapping.

The ALJ found that Beverly's investigation of the incident had been cursory and that Urban had been discharged solely on the basis of the unsupported, uncorroborated observations of one individual. He concluded, and the Board agreed, that Liberty House "simply embraced the opportunity to rid itself of an active union adherent." 326 NLRB No. 29, attachment at 30. Beverly responds only that other employees were sometimes discharged for patient abuse (which we do not doubt is true), but that does not respond to the specific evidence on which the Board relied. Its inference that the real reason for Urban's discharge was anti-union animus must therefore stand.

4. *Mount Lebanon Convalescent Center* (Beverly II)

Problems arose at Mount Lebanon when facility administrators decided to implement a new master schedule without consulting with the Union. The collective bargaining agreement (CBA) contained general language giving the company the right to "direct, control, and schedule its operations work force." The Board agreed with the ALJ's finding that Mount Lebanon's action violated §§ 8(a)(5) and (1), because it changed the schedule without bargaining in a way that reduced the hours and thus the wages of unit employees. In such circumstances, unless there is a clear waiver of the Union's right to bargain over such matters in the CBA, unilateral action is precluded.

The Board was correct to conclude that waivers of statutorily protected rights must be clearly and unmistakably articulated. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). Even though this contract says that the company may "schedule its operations," it does not say anything about schedule changes that affect hours and wages (as opposed to simply scheduling employee A for one shift and employee B for another one). A clause this genera] is not enough to support a finding of waiver of the Union's § 8(a)(5) rights. *Cf Bonnell/Tedegar Indus. v. NLRB,* 46 F.3d 339, 346-47 (4th Cir. 1995) (Union did not unequivocally waive right to bargain over Christmas bonus); *NLRB v. New York Tel. Co.,* 930 F.2d 1009, 1012 (2d Cir. 1991) (provision in CBA authorizing Union access to personnel records with employee's permission did not unequivocally waive Union's right to access records without permission if necessary to process grievances).

5. *West Haven Facility* (Beverly II *and* III)

This case also involved a change in hours and a violation of § 8(a)(5). Facility administrator Robert Haswell notified the Union that West Haven was going to change the break times of the dietary employees, and it did so. The Board found that the company had unilaterally implemented this change, without giving the Union a chance to bargain. In this instance, rather than relying on a "management rights" clause, Beverly argues that it was willing to bargain with the Union but the Union never attempted to do so. The evidence to which it points, however, does not support that interpretation; it shows only that the employees were told their break times were going to change, and that they later filed grievances about it. Beverly Brief at 40; Beverly Supp. App. at 293-309. The record shows that the break schedule was changed "several days" after the announcement, and the Board was entitled to conclude that this was not enough time for bargaining to take place. Evidence also supports the finding, uncontested by Beverly, that the company violated § 8(a)(5) by refusing to give the Union a list of the names, addresses, and rates of pay for all current, regularly scheduled Registered Nurses (RNs) and Licensed Practical Nurses (LPNs). The Union needed this information to evaluate the company's claim that many of these nurses were independent contractors rather than employees.

6. *Beverly Manor Convalescent Hospital,* Monterey (Beverly II)

Beverly Manor (Monterey) issued a warning to Nelia Aldape, a Certified Nurse's Assistant (CNA) regarding a complaint that she had mistreated a patient (essentially by

being rude to her). Aldape was an active participant in a Union organizing campaign. When the administrator of the facility, Susan Chavis, alerted Beverly's area manager, Ronald McKaigg, to Aldape's conduct; he determined that the infraction was actually a dischargeable offense; the matter was reopened and Aldape was discharged. In addition, when Chavis learned that a petition was being circulated on behalf of the Union, she summoned help from McKaigg, who addressed a meeting of the employees at the facility and asked them why they were starting problems. He also told them that he did not like unions and he recounted an incident when he crossed a picket line and was later beaten up and had his car vandalized. The employees responded by airing some grievances.

The Board (overruling the ALJ on this point) found that McKaigg's comments violated § 8(a)(1), because the meeting involved coercive interrogation and appeared to be illegal surveillance of the employees' Union activities. Beverly notes that there must be something coercive about the interrogation, see *NLRB v. Champion Laboratories*, 99 F.3d 223, 227-28 (7th Cir. 1996), and it claims that there was nothing wrong in McKaigg's "rhetorical" questions and statements of opinion. The Board, disagreeing, construed McKaigg's remarks as coercive. This strikes us as the kind of question of judgment on which deference is required; merely to say that there was another way of looking at the evidence cannot carry the day for Beverly.

As for Aldape, Beverly argues that it met its burden of showing that she would have been discharged even if she had never engaged in Union activities. Although it argues that the finding of the California Department of Health Services that Aldape was indeed guilty of patient abuse is helpful to it, the Board correctly responds that this cannot be the case, because

the findings of the state licensing agency issued after Beverly discharged her. At most, that fact would affect the proper remedy. The ALJ found that there was "clear and convincing evidence" -- not just substantial evidence--that Aldape's discharge was motivated by her Union activity. The company's own behavior showed that it did not regard her rudeness to the patient as grounds for discharge, until after McKaigg intervened; it gave her only a warning and then re-opened the matter. Furthermore, director of nursing Asfoor directly told Aldape that her suspension was related to her union activity (a fact not only established by Aldape's testimony, but also corroborated by that of another employee). That is plenty to support the Board's conclusions.

7. *Slayton Manor* (Beverly II)

In this facility, regional human resources manager Barbara Katella invited the employees to contact her about work-related problems. Even though she did not in the final analysis give the employees any benefits they did not already enjoy, the Board found that she would not have acted as a facilitator if there had been no pending union petition at the facility. On that basis, it found a violation of § 8(a)(1). (It also made the uncontested finding that Beverly posted an unlawfully broad no-solicitation rule at the facility, as noted above.)

During a union organizing campaign, the employer must conduct "business as usual' with respect to existing personnel policies and practices. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408-09 (1964). The Board was entitled to find that intervention on behalf of the facility's employees by a mid-tier corporate manager was a benefit beyond "business as usual." Beverly has not offered any evidence to show that

employees who received help from Katella would have gotten the same benefits in the same time frame. We are thus not persuaded that the finding must be overturned.

8. *Kewaunee Health Care* (Beverly II)

No one disputes that the initial step taken here by the facility administrator, Steven Bavers, was unlawful. In the midst of contract negotiations that were going on at the facility, Bayers issued a memorandum telling the employees that they were forbidden from distributing informational pamphlets. A day later, after lawyers were contacted, the facility (through the director of nursing, Kathy Zuege) issued a second memorandum stating that leafletting was permissible if there was no patrolling or blockage of access. The new memo made no reference to the earlier memorandum, but instead purported only to be a general statement of the company's views on leafletting.

The Board found that the second memo did not cure the first, which standing alone amounted to an unfair labor practice. Some employees still did not leaflet, even after the second memo, because they were afraid that they might violate the company's rules. Beverly tries to portray this as a case of quick correction and no harm, but the record showed otherwise, and the Board's conclusion that a violation had occurred did not go beyond the boundaries of that evidence.

9. *Richland Manor* (Beverly II)

At Richland Manor, the General Counsel's complaint al]eged that Beverly had violated §§ 8(a)(1) and (4) by refusing to pay RN employees a scheduled wage increase, denying RN employees the use of established internal

complaint procedures to file a grievance, and conditioning payment of their wage increase on a withdrawal of unfair labor practice charges filed by the Union. The ALJ found that the evidence did not support a finding that the wage increase was withheld because charges were filed and testimony given to the Board. The ALJ also found that Beverly did not violate section 8(a)(1) through administrator Poltarack's statement at a May 1, 1991, meeting asking the nurses to seek withdrawal of the unfair labor practice charges in order to receive the wage increase. On this point, the Board disagreed and found a violation. Even though the nurses themselves were not bargaining unit employees, such an act could chill Union activism of covered employees.

The wrinkle in the case was this: everyone agreed that the company did not put the wage increase into effect in January, and that it later did so in June, retroactive to January I without requiring the charges to be withdrawn. But, as the Board found, during the six-month interim, employees might well have felt deterred from supporting the Union while they did not know what the company ultimately would do. In addition, there is no precedent that requires a company to follow through with its threats in order to violate § 8(a)(1)--that is completely inconsistent with the well established fact that threats themselves can be an unfair labor practice. See, *e.g., Central Transport, Inc. v. NLRB,* 997 F.2d 1180, 1190-91 (7th Cir. 1993) (supervisor's threats to close down plant were unfair labor practice despite supervisors lack of authority to effect plant closure).

We also find without merit SEIU's argument that the Board should have found that the wage increase was illegally withheld from the nurses at Richmond. The company did finally grant the increase, and it made the grant retroactive. As a matter separate from the chilling effect argument we

have just addressed and with respect to which the Board found a violation, there is nothing to the wage increase point.

10. *Beverly Manor, San Francisco* (Beverly II)

At Beverly Manor, San Francisco, Enid Begay was the facility administrator and Rubin Logan was the director of nursing. On May 7, 1991, Johnny Scott was hired as a certified nurse's aide. Shortly thereafter, Logan questioned Scott about his feelings toward the Union at the facility. Scott replied somewhat negatively, saying that it was necessary to be in the Union to work there and that he had some prior negative experiences with unions. Logan then asked Scott if he would support a decertification petition. Scott repeatedly refused to do so, and Logan criticized him continuously. (It appears that Logan was generally unpleasant; he treated some other employees poorly as well and even spit at one.) Logan finally fired Scott for refusing to participate in a decertification effort--an action that the Board found to be a violation of §§ 8(a)(3) and (1).

Beverly argued that it should not be responsible for a character like Logan, because Logan was behaving in a way that was detrimental to its interests in maintaining harmonious relationships with its employees. But, for better or worse, Logan was Beverly's managerial employee, and the Board was not holding Beverly responsible for Logan's manners. Instead, it held Beverly responsible for Logan's act of firing Scott, which was within his authority as director of nursing. This finding was well supported by the evidence, and no principle of agency law exonerates Beverly here.

11. *Carpenter Care Center* (Beverly II)

The Board found two violations at Carpenter Care. The first was based on disciplinary warnings. Timecard violations had been going on at the facility from at least January of 1991, with only one warning issued. When July of 1991 arrived, however, the Union informed management that informational picketing was scheduled to take place on July 18. On the latter date, along with the employee paychecks, the supervisor gave disciplinary warnings to 26 employees for timecard violations. Beverly claims that the warnings just happened to be meted out on July 18 because it was payday, and that the reason they came out of the blue then was because a new supervisor had just come on the scene. But neither the ALJ nor the Board was compelled to accept that explanation, and neither one did. Instead, they found that the warnings were motivated by a desire to interfere with union organizing. This was a permissible inference from the evidence.

The second violation the Board found at Carpenter Care was based on a discharge. The Union filed a complaint to initiate an Occupational Safety and Health Administration (OSHA) safety investigation at the facility. OSHA responded and made plans to come and videotape the way in which residents were lifted and transferred by employees. A team that included the director of nursing asked Olive Wells, a patient, if she would sign a release consenting to be videotaped. Wells seemed to be worried about a government agency coming into the facility and indicated an interest in speaking to her daughter before signing the form. Employee Allison Reaves learned that Wells was upset about the exchange, and she told Wells that it would be "fine" if she signed the release. Carpenter Care's management then

suspended Reaves, claiming that she yelled at Wells. Reaves denied the allegation.

The Board found that Reaves' comment to Wells fell within the scope of Union activity, because the union had initiated the OSHA investigation. (This is another instance in which the Board disagreed with the ALJ, which is naturally within its prerogative to do.) It then decided that her suspension (which was later downgraded to a written warning and instruction on residents' rights, after she filed a grievance) was a violation of § 8. Beverly offers no serious argument against this, except to say that Reaves was not furthering any Union objective when she spoke with Wells. This is yet another instance where the inferences drawn from specific facts can go either way, and thus where we must defer to the Board.

12. *Valley Care and Guidance Center* (Beverly II)

This part of the story began with employee Helen Williams going to Carolyn Hankinson, the facility administrator, to ask how she could go about getting rid of the Union. Hankinson passed the inquiry along to Rod Panyik, the director of human resources, who responded to Hankinson in a letter that laid out the options (a decertification election and a withdrawal of representation based on "objective considerations"). Hankinson explained this to Williams and gave Williams model language to be used in a decertification petition that might be circulated among the employees. Hankinson also told Williams that she would "stand by her," and was as good as her word. Hankinson understood that Williams wanted moral support, and she warned Williams that company property could not be used for the effort. But Hankinson personally drove Williams to the home of another

employee, where both Williams and Hankinson urged the employee to sign the petition. Williams collected a substantial number of signatures, and after she delivered them to Hankinson, Hankinson wrote to the Union representative and announced that they were withdrawing recognition.

The Board found that the decertification petition was unlawful because of the active role Hankinson played in its drafting and circulation. Beverly argues in response that several other employees had also collected enough signatures to show that the decertification desire was a genuine one and was objectively supportable even before Hankinson drove Williams around. But this is a credibility question, and the ALJ decided that there were not enough signatures before that time. No reversible error occurred here.

13. *William Penn Nursing Center* (Beverly III)

William Penn management found out that a union campaign was underway, and it reacted quickly with a wage increase. The Board found that this violated § 8(a)(1), as a benefit offered to sway the voters. Beverly retorts that the wage increase was approved by human resources representative Ray Martinez before Martinez knew about the union campaign. But Martinez offered this explanation to the AIM, who did not believe him. It is worth noting, incidentally, that the ALJ and Board did not find the wage increase itself to be a violation; the violation was in making the announcement on a date timed to bolster the employer's effort to undercut the Union's organizational efforts.

Beverly also raises a second challenge related to William Penn, to the Board's finding that it violated § 8(a)(1) there by creating the impression of surveillance. An employee, Polly Black, visited a co-worker's home one

evening to discuss the Union. The next morning, facility administrator Kenneth Horvath greeted her with "Good morning, Mrs. Black, I understand you had a busy night last night," and asked her to meet with him later. The Board, overruling the ALJ, found that this incident created an unlawful impression of surveillance. Black had also testified that Horvath's use of the more formal "Mrs. Black" instead of "Polly" created a cold impression. The Board was within its rights to conclude that a statement implying that the administrator was keeping an eye on Black's off-hours, off-premises conduct created an impression of surveillance that was impermissible. Once again, the fact that this incident *can* be seen in a more innocuous light is not enough to win the day for Beverly.

14. *Greenwood Health Center* (Beverly III)

At Greenwood, employee Louis Saez, in his capacity as Union delegate, filed a grievance with the facility director of environmental services, Robert Flynn, complaining about disrespectful treatment of employees by supervisors. Instead of meeting with Saez as requested, Flynn questioned other employees about the grievance and held a meeting at which he discussed it. He gave Saez no advance notice of the meeting, and refused to address Saez in his capacity as Union delegate. The ALJ, and then the Board, found that Flynn violated §§ 8(a)(5) and (1), first by interrogating the employees directly about the grievance rather than by going through or including Union delegate Saez, and then by having a grievance meeting without proper notice to the Union representative.

Beverly argues that there was no refusal to bargain because Flynn was just "speaking" to the employees, not

negotiating a settlement of the grievance. And, even though Saez did not know about the meeting in advance, there was a meeting--a sort of no harm, no foul argument. These points do not persuade us to overturn the Board's fmdings. There was a specific procedure to follow with grievances, and Beverly did not follow it. Instead, it tried to cut the Union out of the process in an impermissible way that violated § 8.

15. *Deltona Health Care Center* (Beverly III)

Here, facility administrator Kantarze put up a poster supporting management just outside her office. The poster proc]aimed, "We want to give new management a chance. We don't need a union now." Kantarze had all the department heads sign the poster; below their signatures was some blank space. Dozens of employees signed the poster in that space. The Board found that the poster amounted to a violation of § 8(a)(1) because it pressured the employees to indicate their Union sentiments. Beverly responds that there was no coercion or interference involved either in the posting or in the implicit invitation to "sign on" to the anti-union sentiments.

An employer may hand out anti-union paraphernalia, like coffee mugs with "vote no" on them, without violating the Act. *Circuit City Stores and Limited Food & Commercial Workers,* 324 NLRB 147, 147 (1997). Even so, an employer may not pressure the employees into making an observable choice about the Union that indicates rejection or support. *Id.* The Board found that the act of hanging the poster was coercive and pressured the employees into revealing their preferences. This is a question of judgment and workplace dynamics, and we cannot say that the Board's inferences were unreasonable. The Board could have inferred from the public

nature of the display that employees who did not wish to sign or who had not signed yet were subtly coerced.

16. *East Moline Care Center* (Beverly III)

Both SEIU and Beverly challenge aspects of the Board's decision with respect to the East Moline facility, but we find on both sides of the aisle that the Board acted within its discretion and its findings were supported by substantial evidence.

East Moline's employee manual states that the facility bulletin boards are solely for use by management to post official communications. During the Union campaign, an emp]oyee posted an anti-union poster on a facility bulletin board. A pro-union employee complained to the director of nursing, Jordan, who dismissed his complaint with the comment that he was entitled to his own opinion. The Board found that Beverly violated § 8(a)(1) by the discriminatory enforcement of the rules regarding access to the bulletin boards.

Beverly argued that it never enforced the bulletin board rule against pro-union employees, and thus there was no disparate enforcement. But the Board could have concluded that the fear of Beverly's enforcing the rule against them was enough to chill pro-union employees from putting (unauthorized) things on the boards. There was no evidence offered to show that anyone else had been allowed to post notices on the bulletin boards before the anti-union message appeared, and so the pro-union employees had no reason to hope that they would be exempted from enforcement of the rule.

The day before the election, the company held a mandatory employee meeting to discuss the Union. It posted

guards at the facility entrances during the meeting. Also, during the election itself the company posted guards at the facility entrances closest to the voting areas and required employees to show identification to use those entrances. The Board found no justification for this show of force and concluded that it served only to disparage the Union and its supporters. Beverly tried to suggest that during all-staff meetings and during the election, when much of the staff is away from patients, greater security is necessary for the sake of the patients. But it introduced no evidence indicating that it had such concerns for the patients in analogous situations when the Union element was missing. There was enough evidence here from which the Board could infer a violation.

The Board also rejected some charges with respect to East Moline, and it is these that SEIU attacks. First, the Board found that the discharge of employee Dorothy Theunick two days before the election was not an unfair labor practice. It found that the discharge was inspired in part by anti-union animus, but that Theunick would have been fired no matter what. She had been absent for four days, and upon her return, she falsified the date on an old doctor's note to explain her absence. After her discharge, she attempted to give the facility administrators another note, but they refused to take it. The Board was entitled to conclude that falsifying a doctor's note was serious enough to warrant firing.

The Union also argues that the remedy in East Moline should have been a *Gissel* bargaining order--that is, an order requiring immediate bargaining rather than a new election. The ALJ had ordered Beverly to bargain with the Union based on its earlier showing of majority support through signed authorization cards. He did so because he believed that the posting of the guards, the disparately enforced no-solicitation rule, and an administrator's statement that he would see the

place sold before it got a union so tainted the workforce that a new fair election would not be possible. The Board reversed, finding that the company's conduct was not so egregious or longstanding to warrant this admittedly extreme remedy.

As noted, a bargaining order is an appropriate remedy only if the challenged practices are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Gissel Packing,* 395 U.S. at 614. The Union offers no good reason why a new election would not suffice here. The fact that one administrator made ominous remarks is not necessarily enough, especially since he was not a regional official and the record does not indicate that his views carried special weight with the employees. The Board reasonably decided to allow traditional remedies to do their job, rather than to impose the *Gissel* order.

17. *Park Haven Center* (Beverly III)

At Park Haven, facility administrators refused to furnish the attendance and disciplinary records of the nonUnion employees to the Union. The Union wanted these records because it was concerned that unit employees were being treated differently from their non-unit counterparts. The Board found that the Union had a valid reason to request the records and that Beverly's refusal to turn them over violated §§ 8(a)(5) and (1).

Although Beverly argues that the information could not have been relevant to the Union, because non-union employees were subject to a different tardiness policy, its very defense shows why the Union needed the records. What exactly was the non-union tardiness policy? Were the

differences material to the way in which each group was treated? The Union had the right to explore these issues for itself, rather than taking Beverly's word for it, and for that reason, the Board's decision is supported by substantial evidence.

18. *Garden Terrace Nursing Center* (Beverly III)

During a union campaign, employee Toni Oman was on a break in the shower room discussing the Union with employee Tommie London. Facility personnel supervisor Karen Goodson Henry came in, heard the conversation, and told them that "somebody could get in trouble" for such a discussion. Beverly reads this as a simple reference to Garden Terrace's policy that employees could not solicit Union support in customer care areas, but the ALJ and Board thought that it had more ominous overtones, such as the insinuation that one could get into trouble for discussing the Union at all. If that is what it was--and the Board was entitled to construe it that way--then it was a coercive attempt to get the employees not to join the Union and it thus violated the Act.

At three captive audience meetings held by Garden Terrace facility personnel, facility management explained their anti-union views. They then called on three CNAs, including London, to speak, and each of them also expressed anti-union views. London also talked about the possibility of the employees' forming their own group or union to deal with management. The Board found that London was at that time acting as an agent of Garden Terrace.

If Garden Terrace managers had encouraged an independent union (as London seemed to be doing), they would have violated § 8(a)(1), because employers must

remain neutral. See *NLRB v. Wagner Iron Works*, 220 F.2d 126, 138 (7th Cir. 1955). The key issue is therefore whether the Board's conclusion that London had actual or apparent authority to speak as Garden Terrace's agent is supportable. While we see this as a close call, close calls go to the Board under the applicable standard of review. The managers called on London; London was known to be anti-union; and the Board could have concluded that the managers were trying to use her for a job that they knew they could not do themselves.

19. *Gulf Coast Convalescent Center* (Beverly III)

At Gulf Coast, management approved an across-the-board wage increase for the employees in 1992. Regional director of human resources Alvin Taylor decided to delay the increases to certain personnel when he found out that there was a campaign underway to organize them. For other employees, he approved the wage increases right away. Taylor testified that he was afraid that giving a raise during the organizational campaign would open Beverly up to charges of unfair labor practices. Instead, the Board found that Taylor's *delay* of the raise was an unfair labor practice. Several factors persuaded it to discredit Taylor's alleged dilemma. First, it found that the wage increase had already been approved prior to the start of the campaign and was sorely needed. Second, it found anti-union animus because the company told the employees that the delay was the fault of the Union. Third, immediately after the Union was defeated, the facility implemented the wage increase--a step that the Board saw as reinforcing the message that the Union was to blame for the delay.

Particularly the first of those factors persuades us that the Board's decision passes muster. If the increase was

already approved, then implementing it after the start of the campaign should not have resulted in an unfair labor practice charge. Or, as happened with another facility, Beverly could have tried to work out an arrangement under which it could give the raise in exchange for the Union's agreement not to complain. Harping on the Union's responsibility for the "delay" in the midst of the campaign was also out of line, and also supports the Board's conclusion.

20. *Northcrest Nursing Home* (Beverly III)

Last are the problems the Board found at Northcrest. The day prior to the election there, as had happened in some other places, the facility managers held a mandatory union meeting. At this meeting, unlike earlier ones that had been held, the managers did not intend to answer questions; apparently they wanted only to lecture on their views to the employees. Instead, however, after Chambers (regional director of human resources) began to speak, employee Julie Schriner spoke up in a loud voice, asking if she would get a chance to ask a question. Her intervention disrupted the meeting. Rodger Brown, Beverly's corporate director of associate relations, told her to sit down and that questions were not permitted. He did not mention to Schriner or the assembled group that he also wanted to finish the meeting quickly so that everyone could return to their work stations.

Schriner continued to interrupt until she was threatened with suspension and asked to leave. Northcrest made good on the threats and suspended her for three days without pay. The Board found that Brown overreacted in a way that was designed to chill both Schriner and the other employees in the upcoming election, and that this was a violation of the Act.

An employer has the right to deliver a non-coercive anti-union speech. *Livingston Shirt Corp.*, 107 NLRB 400, 406 (1953). Unions are not entitled to use a medium of communication simply because the employer is using it. *NLRB v. United Steelworkers*, 357 U.S. 357, 363-65 (1958). Finally, as Beverly points out, employers are certainly eh-tit]ed to maintain order and respect in the workplace. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

Beverly says that Brown was doing nothing more than he was entitled to do under those principles, and furthermore that he was just trying to move the meeting along. But he never said a word about the latter goal. And as for the former, it would have been easy to have told Schriner that the time for asking questions would be right after the meeting, which turns out to be when everyone else asked questions. Instead, he decided to tell Schriner to shut up and sit down. While this may have been motivated solely by a "law and order" rationale, the Board was entitled to conclude that it was designed to silence a vocal Union advocate (as Schriner was known to be). Once again, given the deferential nature of substantial evidence review, we see no reason to reverse this finding.

We turn finally to the Board's remedy in this case: a company-wide cease-and-desist order, coupled with a posting requirement and a laundry list of forbidden activities. We give special deference to the Board's choice of a remedy, because of its expertise. *Gissel Packing*, 395 U.S. at 612 n.32. Nevertheless, the Board must restrict itself to orders that "effectuate the policies" of the Act. 29 U.S.C. § 160(c); see also *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). The scope of an order is not overly broad where the Board might reasonably have concluded from the evidence that such an order was necessary to prevent the employer

from continuing to engage in unfair labor practices. *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945).

Factors that are helpful in deciding whether an order is too broad include (1) the number of violations as compared to the number of unaffected parties and facilities, (2) the types of violations, (3) the corporate control over, or causation of, the unfair labor practices, and (4) the publicity of the unfair labor practices among the employees. See *Torrington*, 17 F.3d at 586; *Blount Brothers Corp. v. NLRB*, 571 F.2d 4, 4-5 (7th Cir. 1978). As is true for most multi-factored laundry lists, this one does not tell us which factor counts for more than the others, or how to break the tie when some tend one way and others the opposite way. But they help to structure analysis, even if they do not produce mathematical results, and in the end the choice of a proper remedy is a highly contextual one that does not lend itself to easy formulae.

In *Blount Brothers*, this court found that an isolated incident involving one out of 1,000 employees did not support a sweeping order prohibiting the employer from violating the Act "in any other manner." 571 F.2d at 4. Beverly argues that this might as well be that case: it runs 895 nursing homes, and from 1986 to 1993, the Board found that it had committed approximately 220 unfair labor practices in 54 of those homes. That works out to 6%---not nearly as low as 0.1%, of course, but still a small proportion (yet 60 times greater than the number we dismissed in *Blount Brothers*). But, as is often the case, there are quite a few ways to crunch those numbers, which leaves us feeling that they are not ultimately too helpful. For example, the Board points out that only about 10% of Beverly's facilities (between 90 and 100) have unionized employees. In *Beverly II* and *Beverly III* combined, it committed unfair labor practices at approximately 15% of those facilities. Or, looked at another way, it committed

unfair labor practices during the course of two out of the five representation elections that took place in 1990, or 40% that year. Or perhaps the best numbers take a more global view: in *Beverly III*, a total of eight corporate or regional officials committed 14 violations, at five facilities, during organizational campaigns.

As of the time the Second Circuit decided *Torrington*, it concluded that the record did not support a corporate-wide order because the violations were not serious enough and the record did not provide enough evidence of a corporate-wide policy that was leading to the commission of unfair labor practices. But, as both the Board and the two ALJs here pointed out, the record now before us is a far richer one. The Board was entitled to conclude, especially after specific remedies in *Torrington* did not appear to stop the efforts from the company's central management to stop unions in any way possible, that the time was past for piecemeal relief. Some of the unfair labor practices here were extremely serious, such as the threat to sell the facility in East Moline; others struck at the heart of the collective bargaining relationship, such as those in which facility managers refused to give unions necessary information; some looked more like isolated incidents, serious enough to punish but not likely to poison the workplace for the long term. As a whole, however, it was not a good record.

Perhaps the fact that most strongly supports the Board's chosen remedy, however, is the ubiquitous nature of the area personnel at local facilities whenever labor problems arose. In case after case, at facility after facility, the Board saw regional managers coming in to ensure that Beverly's overall corporate policy was implemented. In itself, there is nothing wrong with central organization, but in this instance the Board was entitled to conclude that nothing less than a

corporate-wide order would do the job of correcting the proclivity this company has shown for committing or tolerating unfair labor practices at a significant number of its facilities. The specific order it entered, however, is problematic. We are concerned that much of it is nothing more than a laundry list of the particular violations committed at individual facilities. There is no reason, for example, for the corporate-wide order to devote two paragraphs to Julie Schriner's situation (and she is there in the order by name). We do not consider it appropriate to go through the order in the first instance and decide which parts are properly directed to the corporation as a whole and which to particular facilities. We leave this task to the Board on remand. Given Beverly's recidivism and the corporate direction the Board has found pervading its handling of union complaints, the Board is entitled to impose corporate-wide relief. But this should be supplemented with relief directed to the individual facilities, for instances in which the violation does not have significance beyond them.

For the reasons stated, the order of the Board is ENFORCED in part and VACATED in part, and the cases are remanded to the Board for further proceedings consistent with this opinion. Costs on appeal shall be taxed against Beverly.

A true Copy:
Teste:

/s/_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed: January 8, 2001]

On Petitions for Review and
Cross-Applications for
Enforcement of Orders of the
National Labor Relations Board
Nos. 6-CA-20188-46, et al.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

BEVERLY CALIFORNIA CORP., f/k/a	)
BEVERLY ENTERPRISES,	)
Petitioners/Cross-Respondents,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent/Cross-Petitioners.	)

SERVICE EMPLOYEES INTERNATIONAL)
UNION, AFL-CIO, and DISTRICTS 1199P and)
1199II, SEIU, AFL-CIO,)
Petitioners,)
v.)
NATIONAL LABOR RELATIONS BOARD,)
Respondent.)

ORDER

On consideration of the petition for rehearing filed in the above matter by counsel for Petitioner Beverly California Corporation on October 24, 2000, all members of the panel have voted to **DENY**.

Accordingly, the petition for rehearing is hereby **DENIED**.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Filed: March 23, 2001]

Nos. 98-3177, 99-1097, 98-3683,
99-1124, 98-3721, and 99-1382

BEVERLY CALIFORNIA, CORPORATION, f/k/a BEVERLY ENTERPRISES, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities,	)
Petitioners/Cross-Respondents,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent/Cross-Petitioner.	)

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO and DISTRICTS 1199P and 1199II, SEIU, AFL-CIO,	)
Petitioners,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent.	)

JUDGMENT

Before: WOOD, JR., KANNE, and DIANE P. WOOD, Circuit Judges.

The above consolidated cases came to be heard upon petitions filed by Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and Service Employees International Union, AFL-CIO, and Districts 1199P and 119911, SEIU, AFL-CIO, to review orders of the National Labor Relations Board in Board Case Nos. 6-CA-20188-46, et al., and 6-CA-24221(2) issued against said Petitioners in 98-3721, 99-1124, and 99-1382, their officers, agents, successors, and assigns, on August 21, 1998 and upon cross-applications filed by the National Labor Relations Board to enforce said orders. The Court heard argument of respective counsel on October 26, 1999, and has considered the briefs and transcript of record filed in this case. On September 13, 2000, the Court, being fully advised of the premises, issued its decision enforcing in part and vacating in part certain orders of the Board, and remanding the cases to the Board for further proceedings. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

A. Petitioner, Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities, and each of them, its officers, agents, successors, and assigns, shall:

I. Pioneer Place facility

1. Cease and desist from:

(a) Soliciting employees to form and join organizations to represent them as to their terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

II. Fountainview Place facility

1. Cease and desist from:

(a) Threatening employees with reprisals for having selected a union as their collective-bargaining representative.

(b) Disciplining or otherwise discriminating against employees for serving as union observers during representation elections under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary actions taken against Lily Davis and Kastle Gannon, and within 3 days thereafter notify them in writing that this has been done and that evidence of their unlawful disciplines will

not be used as a basis for future personnel action against them.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

III. Liberty House Nursing Home

1. Cease and desist from:

(a) Discharging employees because of their activities on behalf of or support for a union, or their participation in other concerted protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Peggy Urban full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge, employee Peggy Urban for any loss of earnings and other benefits as a result of the discrimination

against her, in the manner set forth in the remedy section of the Board's Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of employee Peggy Urban, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records,, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

IV. Mount Lebanon Manor Convalescent Care Center facility

1. Cease and desist from:

(a) Unilaterally changing terms and conditions of employment of employees, including implementing a master schedule, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(b) Failing and refusing to supply the Union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(b) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in the master schedule.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

V. Danbury Pavilion Health Care facility

1. Cease and desist from:

(a) Unilaterally changing terms and conditions of employment of employees, including discontinuing short pay policy, without prior notice to or affording an opportunity to

bargain with New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in short pay policy.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

VI. West Haven Nursing facility.

1. Cease and desist from:

(a) Failing and refusing to supply New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

VII. Beverly Manor Convalescent Hospital facility

1. Cease and desist from:

(a) Interrogating employees about their union sentiments.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Telling employees that their suspensions are related to their union activity.

(b) Threatening employees with disciplinary action for engaging in lawful union or protected concerted activity.

(e) Discharging or suspending employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nelia Aldape full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge and suspension, employee Nelia Aldape for any loss of earnings and other benefits suffered as a result of the discrimination practiced against her, in the manner set forth in the remedy section of Board's Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the suspension and discharge of employee Nelia Aldape, and within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

VIII. Slayton Manor Nursing Home facility

1. Cease and desist from:

(a) Soliciting and adjusting employee complaints and grievances during union organizing campaigns.

(b) Posting or promulgating unlawfully broad no-solicitation or no-distribution rules.

(c) Forbidding lawful solicitation or distribution on behalf of unions during nonwork time and in non-patient care areas.

(d) Creating the impression that employees' union activities are under surveillance.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

IX. Kewaunee Health care facility

Cease and desist from:

(a) Threatening employees with disciplinary action for engaging in lawful union or protected concerted activity, including distribution of union literature.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

X. Beverly Health Care Center facility

1. Cease and desist from:

(a) Threatening employees with discharge for engaging in lawful union or protected concerted activity, including strikes and picketing.

(b) Promising benefits, including the recission of disciplinary action for crossing union picket lines to come to work.

(c) Discharging employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Cathy Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge, employee Cathy Lewis for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the Board's Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Cathy Lewis and, within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

XI. Richland Manor facility

Cease and desist from:

(a) Conditioning the payment of a wage increase on the withdrawal of unfair labor practice charges.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

XII. Sanger Hospital facility

Cease and desist from:

(a) Threatening employees with reprisals for having selected a union as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

XIII. Beverly Manor facility

1. Cease and desist from:

(a) Interrogating employees about union sentiments.

(b) Soliciting employees to sign and/or circulate decertification petitions.

(c) Assaulting union representatives or delegates.

(d) Telling employees that union representatives or delegates will be killed.

(e) Discharging employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Johnny Scott full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of his unlawful discharge, employee Johnny Scott for any loss of

earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of Board's Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Johnny Scott and, within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

XIV. Duke Convalescent facility

1. Cease and desist from:

(a) Threatening employees with disciplinary action and/or discharge for engaging in lawful union or protected concerted activity.

(b) Ordering them to remove from the facility all of employee coffee mugs bearing union logos.

(c) Discharging, suspending, or imposing any disciplinary action on employees, including written warnings, because of their activities on behalf of a union, or their participation in other concerted protected activity.

(d) Forbidding unlawful solicitation or distribution on behalf of unions during nonwork time and nonpatient care area.

(e) Interrogating employees about their union sympathies.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Amy Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of their unlawful discharge or suspension of employees Amy Johnson and Valerie Faulkner for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of the Board's Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharges or suspensions of Amy Johnson and Valerie Faulkner and, within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

XV. Carpenter Care Center facility

1. Cease and desist from:

(a) Discharging, suspending, or imposing any disciplinary action on employees, including written warnings, oral warnings, or transfers because of their activities on behalf of a union, or their participation in other concerted protected activity.

(b) Unilaterally changing terms and conditions of employment of employees, including implementing changes in its policy of immediately reimbursing employees for the purchase of prescription drugs, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(c) Failing and refusing to supply any union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove the unlawful disciplinary actions taken against Lily Davis, Kastle Gannon, Alice Adams, Esther Bennett, Charles

Benninger, Amanda Bradish, Jennifer Buckingham, Patt Cart, Suzanne Clearwater, Betty Cona, Helen Evans, Carolyn Ferguson, Antoinette Gorko, Donna Hollister, Karen Holsopple, Sharon Karp, Herman Kathi, Lori King, Deborah Kintner, Dawn Kisner, Linda Krill, David Lewis, Marie Meador, Dorothy Moskowitz, Debra Redmond, Chris Sherida, Lorraine Zelenka, and Mary Zone, and, within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(b) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(c) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in its policy of immediately reimbursing employees for the purchase of prescription drugs.

(d) Upon request, rescind the unilateral discontinuance of its policy of immediately reimbursing employees for the purchase of prescription drugs.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

XVI. Stroud Manor facility

1. Cease and desist from:

(a) Soliciting and adjusting employee complaints and grievances during union organizing campaigns.

(b) Promising to expedite the receipt of employee benefits, including tuition reimbursement.

(c) Unilaterally changing terms and conditions of employment of employees, including withholding annual wage increases, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before withholding annual wage increases.

(b) On request by the Union, reinstate annual wage increases.

(c) Make whole, the employees for any monetary losses they may have suffered by reason of the Petitioner's unilateral withholding of annual wage increases which the employees would have received in the manner set forth in the remedy section of the Board's Decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

XVII. Valley Care and Guidance Center facility

1. Cease and desist from:

(a) Interrogating employees about their union sentiments.

(b) Soliciting employees to sign and/or circulate decertification petitions.

(c) Telling employees that union organization is futile.

(d) Demanding immediate repayment of loans in retaliation for joining a union.

(e) Telling employees that other employees had been solicited and paid to vandalize the property, including automobiles, of union supporters.

(f) Failing and refusing to supply Hospital and Healthcare Workers, Local 250, SEIU, AFL-CIO-CLC representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(g) Failing and refusing to bargain in good faith, and withdrawing recognition from the Union selected by its employees as their collective-bargaining representative.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other forms and conditions of employment with the Union selected by its employees as their collective-bargaining representative.

(b) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

B. In all other respects, these cases are remanded to the Board for further proceedings consistent with the Court's opinion.

IT IS FURTHER ORDERED that costs on appeal shall be taxed against Beverly.

/s/_____
Judge, United States Court of
Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed: 5/11/1999]

Before Hon. DIANE P. WOOD, *Circuit Judge*

Petitions for Review of an Order of the
National Labor Relations Board

Nos. 6-CA-20188, 6-CA-22084-23,
6-CA-22084-24, 6-CA-22048-29, 6-CA-24221,
6-CA-25548, 6-CA-25548-1, 6-CA-25548-4

SERVICE EMPLOYEES INTERNATIONAL,	)
UNION, AFL-CIO, CLC and DISTRICT 1199II,	)
SEIU, AFL-CIO,	)
Petitioners,	)
Nos. 98-3177, 98-3898, and 99-1097	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent,	)
and	)

BEVERLY CALIFORNIA CORPORATION)
formerly known as, BEVERLY ENTERPRISES,)
its Operating Divisions, Regions, Wholly-Owned)
Subsidiaries and Individual Facilities,)
Intervenor-Respondent.)
and)
BEVERLY CALIFORNIA CORPORATION,)
formerly known as, BEVERLY ENTERPRISES,)
its operation Regional Offices, wholly-owned)
subsidiaries and individual facilities,)
Petitioner, Cross-Respondent,)
Nos. 98-3683, 98-3721, 99-1124 and 99-1382)
v.)
NATIONAL LABOR RELATIONS BOARD,)
Respondent, Cross-Petitioner.)

Upon consideration of the **MOTION TO ENLARGE PAGE LIMITATIONS**, filed on May 7, 1999, by counsel for the petitioner Beverly California Corporation,

IT IS ORDERED that the motion is GRANTED in part and DENIED in part. Petitioner Beverly California Corporation is granted leave to file an opening brief that does not exceed 19,600 words.

The court will not entertain a motion to reconsider this order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed: 5/19/1999]

Before Hon. DIANE P. WOOD, *Circuit Judge*

Petitions for Review of an Order of the
National Labor Relations Board

Nos. 6-CA-20188, 6-CA-22084-23,
6-CA-22084-24, 6-CA-22048-29, 6-CA-24221,
6-CA-25548, 6-CA-25548-1,
6-CA-25548-4

SERVICE EMPLOYEES INTERNATIONAL,	)
UNION, AFL-CIO, CLC and DISTRICT 1199II,	)
SEIU, AFL-CIO,	)
Petitioners,	)
Nos. 98-3177, 98-3898, and 99-1097	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent,	)
and	)

BEVERLY CALIFORNIA CORPORATION)
formerly known as, BEVERLY ENTERPRISES,)
its Operating Divisions, Regions, Wholly-Owned)
Subsidiaries and Individual Facilities,)
Intervenor-Respondent.)
and)
BEVERLY CALIFORNIA CORPORATION,)
formerly known as, BEVERLY ENTERPRISES,)
its operation Regional Offices, wholly-owned)
subsidiaries and individual facilities,)
Petitioner, Cross-Respondent,)
Nos. 98-3683, 98-3721, 99-1124 & 99-1382)
v.)
NATIONAL LABOR RELATIONS BOARD,)
Respondent, Cross-Petitioner.)

The following are before the court:

1. **MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION, AND REQUEST FOR EN BANC CONSIDERATION OF THE MOTION OR, ALTERNATIVELY, THREE-JUDGE PANEL REVIEW**, filed on May 14, 1999, by counsel for petitioner Beverly California Corporation.

2. **OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION, AND REQUEST FOR EN BANC CONSIDERATION OF THE MOTION OR, ALTERNATIVELY, THREE-JUDGE PANEL**

REVIEW, filed on May 19, 1999, by counsel for the respondent, National Labor Relations Board.

IT IS ORDERED that #1 is **DENIED**.

APPENDIX F

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them *and* Service Employees' International Union, Local 606, AFL-CIO *and* United Food and Commercial Workers International Union Local 917, AFL-CIO *and* Peggy M. Urban *and* District 199P, National Union of Hospital and Health Care Employees, SEIU, AFL-CIO *and* New England Health Care Employees Union, District 1199/S.E.I.U. AFL-CIO *and* Gladys Hahn *and* Hospital and Health Care Workers Local 250, SEIU, AFL-CIO--CLC ***and*** **United Food and Commercial Workers International Union, Local 1161, AFL-CIO *and* District 1199W/United Professional for Quality Health Care *and* Service Employees International Union, Local 150, AFL-CIO *and* United Steelworkers of America,** AFL-CIO-CLC. Cases 6-CA-20188-46 (formerly 16-CA-13556), 6-CA-20188-48 (formerly 25-CA-19478), 6-CA-20188-49 (formerly 11-CA-12946), 6-CA-22018, 6-CA-23243, 6-CA-23373, 6-CA-23374, 6-CA-23616, 6-CA-22084-12 (formerly 4-CA-19732), 6-CA-22084-17 (formerly 4-CA-19966), 6-CA-22084--18 (formerly 4-CA-19666-2), 6-CA-22084-25

(formerly 4-CA-20286), 6-CA-22084-26 (formerly 4-CA-20406), 6-CA-22084-28 (formerly 4-CA-20509), 6-CA-22084-30 (formerly 4-CA-20468), 6-CA-22084-31 (formerly 4-CA-20568), 6-CA-22084-32 (formerly 4-CA-20996), 6-CA-22048-1(formerly 34-CA-4205), 6-CA-22084-2 (formerly 34-CA-4358), 6-CA-22084-23 (formerly 34-CA-5443), 6-CA-22084-3 (formerly 32-CA-10964), 6-CA-22084-4, (formerly 32-CA-10951), 6-CA-22084-7 (formerly 32-CA-11071), 6-CA-22084-13 (formerly 20-CA-24069), 6-CA-22084-14 (formerly 32-CA-11919), 6-CA-22084-15 (formerly 32-CA-11950), 6-CA-22084-19 (formerly 32-CA-12024), 6-CA-22084-20 (formerly 32-CA-11881), 6-CA-22084-21 (formerly 32-CA-11890), 6-CA-22084-27 (formerly32-CA-12372), 6-CA-22084-5 (formerly 18-CA-11232), 6-CA-22084-6 (formerly 30-CA-10851), 6-CA-22084-8 (formerly 30-CA-10863), 6-CA-22084-9 (formerly 3 O-CA- 10951), 6-CA-22084-22 (formerly 30-326 NLRB No. 29CA-11498), and 6-CA-22084-11 (formerly 9-CA-27620)

August 21, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On June 29, 1994, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.[1]

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[1] We deny as moot the General Counsel's motion to expedite the decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions,[3] except as

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[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

With respect to Slayton Manor Nursing Home in Slayton, Minnesota, the judge found that the Respondent's area human resources representative, Barbara Katella, "testified that at the meetings she did speak to the employees about work related problems. She invited them to contact her about these problems and offered to do what she could to resolve them." Katella did not testify that she explicitly offered to resolve the employees' problems. We find, however, that such an offer was implicit in her invitation to employees to contact her about their problems. Further, an employee who attended the meetings testified that Katella did explicitly promise to try and resolve employee problems. Therefore, the judge's factual error does not affect his finding that the Respondent violated Sec. 8(a)(1) by soliciting grievances.

With respect to the Richland Manor facility in Johnnstown, Pennsylvania, we agree with the judge's dismissal of the 8(a)(4) allegation regarding withholding of the wage increase because we see no basis for overturning the judge's crediting of testimony showing that the increase would have been withheld without regard to any withdrawal of unfair labor practice charges. Contrary to the judge, however, we find that the Respondent violated Sec. 8(a)(1) through Administrator Poltarack's statement at the May 1, 1991 meeting asking the registered nurses to seek withdrawal of certain unfair labor practice charges in order to receive the wage increase.

The judge incorrectly found that Kewaunee Health Care facility's employee Jean Ferron had testified that the threats contained in the Respondent's March 15, 1990 memo were a factor in her decision not to handbill at the facility on March 18, 1990. Only employee Mary Murphy so testified. This correction does not affect the judge's finding, which we adopt, that the Respondent's

modified below and to adopt the recommended Order as modified and set forth in full below.

A. Pioneer Place facility, Irving, Texas

March 15 memo unlawfully threatened employees in violation of Sec. 8(a)(l).

We agree with the judge that the Respondent at Duke Convalescent facility in Lancaster, Pennsylvania, violated Sec. 8(a)(l) by ordering a supervisor, in the presence of an employee, to remove from the facility a union coffee mug belonging to an employee.

There are no exceptions to the complaint allegations with respect to the Mark Twain Hospital facility in San Andreas, California. There are no exceptions to the judge's supervisory determinations.

[3] We adopt the judge's finding that the Respondent's unilateral implementation of a master schedule at its Mount Lebanon facility that effectively reduced the hours and earnings of some full-time unit employees violated Sec. 8(a)(5) and (1) of the Act. We rely on the reasons stated by the judge. We also note that the waiver standard applied by the judge in rejecting the Respondent's claim that the Union had yielded its bargaining fights over the matter by agreeing to the management-rights clause is mandated by Board precedent which has been accepted by the court of appeals whose jurisdiction includes the State in which this unfair labor practice arose. *Ciba-Geighy Pharmaceuticals Div. v. NLRB,* 722 F.2d 1120, 1127 (3d Cir. 1983). Accord: *NLRB v. Postal Service,* 18 F.3d 1089, 1099-1100 (3d Cir. 1994). Furthermore, the "employer bears the weighty burden of establishing that a 'clear and unmistakable' waiver has occurred.'' *NLRB v. New York Telephone Co.,* 930 F.2d 1009, 1011 (2d Cir. 1991). Because, as our dissenting colleague concedes, the clause is ambiguous, it clearly does not meet the applicable clear and unmistakable waiver standard. At this point it is irrelevant whether the Respondent could show such a waiver by the resort to extrinsic evidence to resolve the ambiguity. It failed to do so at the hearing in which the matter was litigated, and it must stand or fall on that record. Hence, we do not agree with our colleague that a remand is appropriate.

Contrary to our colleague, we agree with the judge that the Respondent violated Section 8(a)(1) by soliciting employees to form and join an employee council, and by posting notices to implement the selection of employee participants. It was clear from the announcement that the Respondent intended the employee council to resolve employee complaints concerning their working conditions and that the council was designed to engage in a pattern and practice of dealing with the Employer over these matters. Consequently, the Respondent's efforts to establish an employee council to resolve these problems was unlawful.[4] Contrary, to our dissenting colleague, we are not persuaded that no violation of the Act was committed simply because the Respondent did not complete the formation of the announced employee council, nor do we think that the Respondent's actions can be dismissed as an "isolated incident." The Respondent undermined the Union in the eyes of the employees by holding out the prospect of a separate employer-fostered channel for resolving workplace complaints and soliciting employee participation in it. Although the Respondent abandoned the plan before employees were actually selected, the Respondent issued no repudiation of its actions meeting the standards for repudiation set by *Passavant Memorial Hospital,* 237 NLRB 138 (1978). We see no basis for establishing a special exception to the *Passavant* rule for employer establishment of employee committees dealing with workplace problems.

B. *Beverly Manor Convalescent Hospital facility, Monterey, California*

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[4] *E. I. du Pont & Co.*, 311 NLRB 893 (1993).

(l) On June 24, 1991, certified nursing assistant, Nelia Aldape, was given a written warning for an incident in which the daughter of a patient complained about her mother's treatment. Aldape believed that the writeup was not justified and immediately thereafter began promoting union representation. On July 7, 1991, the Respondent's area manager, Ronald McKaigg, told Administrator Susan Chavis that Aldape's conduct was really a dischargeable offense and that she should follow up on the matter. Subsequently, on about July 12, 1991, Assistant Director of Nursing Julia Michaels was informed by Director of Nursing Janis Asfoor that Aldape and charge nurse, Josie Tillman, would have to be discharged because of the Union. That same day, Asfoor telephoned Aldape and informed her that she was being suspended because of her union activities. Three days' later, the Respondent discharged Aldape for what it called patient abuse.

We agree with the judge that the Respondent unlawfully discharged Aldape for her union activities.[5] Three days prior to the discharge, Director of Nursing Janis Asfoor informed Aldape that she was being suspended and that her suspension was related to her union activities. We also agree with the judge that the Respondent violated Section 8(a)(1) by

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[5] We do not in any manner condone patient abuse. Where the Respondent has raised this matter here and, as discussed elsewhere by the judge, at other facilities in which it was alleged to have occurred, we adopt the judge's finding of unlawful conduct solely for the reason that the Respondent failed to establish such allegations.

The record indicates that Michaels testified that Asfoor, not Chavis as found by the judge, told her that Aldape and Tillman would have to be discharged because of the Union.

informing Aldape that she was being suspended for her union activities. The judge, however, inadvertently failed to pass on whether the Aldape suspension was also unlawful. Inasmuch as the suspension was one of the steps taken as part of the Respondent's unlawful efforts to discharge Aldape, we find that the suspension also violated Section 8(a)(3) and (1) of the Act.

(2) The judge dismissed allegations that McKaigg interrogated employees and created the impression of surveillance. The General Counsel excepted to the judge's findings. We find merit in those exceptions.

The Union commenced its campaign in approximately the last week of June 1991. On July 7, 1991, the Respondent's area manager, Ronald McKaigg, addressed a meeting of some 25 employees from the day and afternoon shifts. The Respondent's administrator and other staff representatives were also in attendance. McKaigg told the employees that he was aware that the employees were organizing, and asked them why. He stated that he had made himself available to employees and would like to have been notified.

McKaigg also asked the employees why they were starting problems. Several employees responded by airing their grievances.

The judge concluded that McKaigg's statement that he wondered why the employees sought union representation was not designed to identify union adherents. He found that McKaigg's questions were essentially rhetorical rather than a coercive interrogation. The judge also found that MeKaigg's statements did not create the impression of surveillance.

Contrary to the judge, we find that McKaigg's questioning of why employees were organizing and starting problems was calculated to elicit a response from employees

concerning their union sympathies.[6] Further, the interrogation occurred under coercive circumstances: (1) the questions were asked in a meeting called by the Respondent; (2) the meeting and questioning was conducted by a high ranking management official, in the presence of the administrator and other officials; and (3) in labeling the organizing campaign as "starting problems," McKaigg was indicating the Respondent's displeasure with the Union. Accordingly, we find that the Respondent violated Section 8(a)(1) by coercively interrogating employees about why they were organizing.[7]

There is no evidence that, at the time of the meeting, the organizing campaign was public knowledge, or that the Respondent had been informed of the campaign by the Union or its employees. Accordingly, we find that McKaigg's statement that he was aware of the union organizing campaign conveyed to employees the impression that their activities, on behalf of the Union, were under surveillance by the Respondent, in violation of Section 8(a)(1).[8]

C. Wyoming Valley Health Care facility, Wilkes-Barre, Pennsylvania

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[6] See *NLRB v. McCullough*, 5 F.3d 923 (5th Cir. 1993). Moreover, in this case, the employees obviously believed that to be the case inasmuch as several of them expressed their complaints and reasons for wanting the Union.

[7] We find it unnecessary to pass on whether the Respondent's human resources representative, Jay Laws, unlawfully interrogated employees since any finding of a violation would be cumulative.

[8] *Schrementi Bros, Inc.*, 179 NLRB 853 (1969).

The judge dismisses the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging Christopher (Chris) Tausch. We reverse and find the violation.

Tausch was paid by the Union to seek employment with an employer for the purpose of organizing from the inside. After being hired by the Respondent as a nurses aide, Tausch started gathering information and soliciting employees to support the Union. One evening, Tausch went into the kitchen area of the dietary department. The kitchen area was posted against entry by nondietary department employees. However, on a recurring basis, nondietary employees went into the kitchen without permission to pick up meal trays. Tausch asked dietary employee Charles Weitz for the names and addresses of two other dietary department employees. Weitz told him that there was a list of telephone numbers in the office of Dietary Department Manager Richard Rutkowski, who was out of the office. Wietz then led Tausch to Rutkowski's office where Tausch copied from a list taped to the wall beside the desk.

Later in the evening, Weitz told Rutkowski that a nurse had been in his office, taking down dietary department employees' telephone numbers. The following morning, Tausch visited Weitz at his house and solicited him to support the Union. Later, Weitz complained to Rutkowski about Tausch bothering him at home about joining the Union and identified Tausch as the nurse who had visited Rutkowski's office the previous night. Rutkowski reported the incident to Administrator Donna Connery.

Tausch in his discharge interview with Connery admitted that he had talked with Weitz in the kitchen and that he had copied the telephone numbers. The Respondent discharged Tausch for the unauthorized entering of the restricted dietary department area and removing confidential

information from the facility in violation of company policy prohibiting the divulging of employee, patient, or company confidential information. Connery testified that Tausch would not have been discharged for just being in the dietary department, but that it was the taking down of the telephone numbers that led to his discharge.

The judge noted that not only did Tausch go into the dietary department without authorization, he went into the office of the dietary department manager and took down employee telephone numbers that the judge found were considered to be confidential. He concluded that because of Tausch's misconduct he would have been discharged even if he had not been engaged in union activity.

It is uncontroverted the Respondent admittedly had knowledge of Tausch's organizing efforts. Contrary to the judge, we find that the telephone numbers were not confidential. Although the Respondent claims that the telephone numbers are covered by the confidentiality policy, there is no evidence to indicate that the Respondent had previously treated employee telephone numbers as confidential. Indeed, the employee handbook provisions regarding confidential information does not mention employee telephone numbers, and employees openly took telephone numbers, without being disciplined, from a rolodex located at the nurses station. Further, the telephone numbers copied by Tausch were displayed in the open on a wall where they could be viewed by anyone entering the office. Therefore, we find that the Respondent's claim that Tausch was discharged for taking down confidential telephone numbers was a pretext; and given the report to the Respondent concerning his union solicitation just before his discharge, we conclude that the General Counsel has established that Tausch's union activity

was a motivating factor in the Respondent's decision to discharge him.

Contrary to the judge, we find that the Respondent has failed to support its burden of showing that it would have discharged Tausch absent his union activities.[9] Inasmuch as we have found that the Respondent's confidentiality defense was pretextual, the Respondent's only remaining justification for Tausch's discharge is his unauthorized entry into the dietary department. The Respondent admits that Tausch's unauthorized entry into the dietary department would not by itself have caused him to be discharged. We, therefore, find that the Respondent failed to establish by a preponderance of the evidence that it would have discharged Tausch if he had not engaged in union activities. Accordingly, we find that Respondent's discharge of Tausch violated Section 8(a)(3) and (1).

D. Carpenter Care Center, Tunkhannock, Pennsylvania

(1) The judge dismisses the allegation that the Respondent unlawfully disciplined employee Allison Reaves. We disagree. In approximately July 1991, the Union filed a complaint with OSHA concerning employee work-related injuries caused by lifting patients. On November 20, 1991, OSHA investigators appeared at the facility seeking to videotape patients performing patient transfers. The Respondent refused to allow them to videotape. On November 21, the OSHA investigators returned with a warrant, but were again refused access for purposes of videotaping. The following day, the Union handed out fliers in front of the

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[9] *Wright Line*, 251 NLRB 1083 (1980), 462 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982).

facility. The fliers mentioned the Respondent's refusal to comply with the warrant requiring it to allow the videotaping and reiterated the Union's position that the Respondent maintained unsafe working conditions. After some litigation, the Respondent agreed to permit OSHA to inspect the facilities, including videotaping patients, who had given their written consent or signed a release.

In early January 1992, the Union's local president sat in on OSHA interviews with injured employees. On January 13, 1992, three of the Respondent's officials asked patient Olive Wells if she would be willing to be videotaped. Wells had trouble understanding the concept and was concerned about a government agency coming into the facility. Wells stated that she wanted to talk to her daughter before making a final decision. The following night, Wells appeared to be upset and nurses aide Allison Reaves asked her how she was. Wells stated that the previous night three women had spoken to her, and that she was afraid that if she signed a release to be videotaped, the state would either come in and take the place over or close it down. Reaves explained the purpose of the OSHA visit and advised her to discuss such matters with her daughter. Reaves also told Wells that if she was ever again asked to sign a release, it would be fine to sign it.

The next day, January 15, 1992, both Wells and Wells' daughter complained to the Respondent's director of nursing that Reaves had yelled at Wells the previous night. On January 16, 1992, the Respondent suspended Reaves for yelling at Wells. After a grievance was filed over the suspension, the Respondent reduced the suspension to a written oral warning and reassigned Reaves to a different wing of the facility. Reaves was reimbursed for money lost during her suspension.

The judge found that Reaves neither yelled, threatened, coerced, nor otherwise intimidated Wells. The judge found, however, that Reaves was not engaged in union activity when she encouraged Wells to cooperate with the OSHA investigation. The judge found that although the Union initiated the OSHA investigation, the decision to pursue the matter and the investigation were not union but OSHA activities; and Reaves' decision to encourage Wells to participate in the OSHA investigation was not done in concert with other employees. Accordingly, the judge dismissed this allegation of the complaint. We find merit to the General Counsel's exception to the dismissal of this allegation.

The Board has long held that "an employee may properly engage in communication with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, on going labor dispute between the employees and their employer." *Allied Aviation Service Co. of New Jersey,* 248 NLRB *229,* 230 (1980), and cases cited therein. Further, the Board does not take a restrictive view in determining whether the statements are related to a particular labor dispute.[10] The test is "whether the communication was *a part of and related to* the on going labor dispute."[11]

Applying these principles to Reaves' statements to Wells, we find that Reaves' comments constituted protected concerted activity. Reaves' encouragement of Wells to allow herself to be videotaped was in furtherance of the Union's

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[10] *Roure Bertrand Dupont, Inc.*, 271 NLRB 443,448 (1984).

[11] *Allied Aviation Service Co. of New Jersey*, supra at 231. (Emphasis in the original.)

objective of having OSHA conduct an investigation of the facility's working conditions. The Union not only filed the complaint to initiate the OSHA investigation, it leafleted the facility to persuade the Respondent to allow OSHA to videotape the patients, and it sat in on OSHA's interviews of the injured employees. Reaves' solicitation of Wells' cooperation with OSHA's investigation was a continuation of the Union's efforts and, therefore, directly related to this matter. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by disciplining Reaves for engaging in protected concerted activity.

(2) On January 17, Reaves filed a grievance protesting her suspension. Subsequent to the second step grievance meeting of January 21, the union organizer on January 23 wrote a letter to the Respondent stating:

> I am requesting all evidence, statements and documentation leading to the suspension of Allison Reaves on January 17, 1992. This information is necessary in order to properly prepare for continuation to the next step of the grievance.

The Respondent did not supply the Union with the requested information. The Union did not further pursue the grievance.

The judge found that the information requested by the Union was no longer necessary or relevant to the grievance process because there was no grievance pending. Accordingly, the judge concluded that the Respondent was no longer obligated to provide the requested information and that its failure to do so did not violate Section 8(a)(5) and (1). We disagree.

The Union's request for information concerning Reaves' suspension was clearly relevant to the processing of her grievance. Accordingly, inasmuch as Reaves' grievance was still pending when the Union requested information concerning her suspension, we find that the Respondent violated Section 8(a)(5) by failing to furnish the Union with the requested information.[12]

(3) In processing the grievance regarding the suspension and subsequent discharge of nurses aide Patricia Cart for patient abuse, the Union, on February 18, requested that the Respondent provide it with all evidence, statements, and documentation leading to her suspension and termination. When the Respondent failed to respond to this request, the Union filed a charge with the Board on March 19. At a grievance meeting on April 15, the Respondent provided the Union with the requested information concerning Carr. As of the date of the hearing, the date for arbitration regarding Carr's suspension and discharge had not been set.

The judge concluded that inasmuch as arbitration was still pending when the Respondent provided the information, there was no showing that the Union had been prejudiced by any delay in providing the information. Accordingly, he found that the Respondent did not violate Section 8(a)(5) and (1) by providing the information 2 months after the request was made. We disagree with the judge's dismissal of this complaint allegation.

It is well established that when a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately

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[12] *Designcraft Jewel Industries*, 254 NLRB 791, 796 (1981).

explain why the information was not furnished.[13] The Respondent, however, never gave an explanation for failing to comply with the Union's request for 2 months. Further, the Respondent's belated compliance, after the unfair labor practice charge was filed, did not retroactively cure the unlawful refusal to supply the information.[14] Accordingly, we find that the Respondent violated 8(a)(5) and (I) by refusing to supply the Union with the requested relevant information.

E. Duke Convalescent facility, Lancaster, Pennsylvania

Contrary to the judge, we find that the Respondent violated Section 8(a)(1) at the Duke Convalescent facility in Lancaster, Pennsylvania, by interrogating open union supporters Valerie Faulkner and Harry Brooks about their union sympathies. Steve Marek, a labor consultant hired by the Respondent to help it respond to the union campaign at the facility, called Faulkner into a closed room to speak to her separately. Marek admits asking Faulkner what she thought a union would do for her. Similarly, Marek approached Brooks in the breakroom, persisted in "educating him about management's viewpoint," and concluded by asking him how he was going to vote in the election. As the Fifth Circuit has stated, the mere fact that an employee "was a widely-known union adherent does not validate otherwise coercive interrogation: 'Although an employee has openly declared his support for the union, the employer is not hereby free to

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[13] *Interstate Food Processing*, 283 NLRB 303, 306 (1987); *Quality Engineered Products*, 267 NLRB 593, 598 (1983).

[14] *Interstate Food Processing*, id.; *Postal Service*, 276 NLRB 1282, 1288 (1985).

probe directly or indirectly into his reason for supporting the union.'" *NLRB v. Brookwood Furniture,* 701 F.2d 452, 463 fn. 35 (5th Cir. 1983) (quoting *TRW-United Greenfield Division v. NLRB,* 673 F.2d 410, 418 (5th Cir. 1981). We find that these interrogations went beyond the bounds of permissible questioning and that they were coercive in violation of Section 8(a)(1). See *Stoody Co.,* 320 NLRB 18 (1995).

The Remedy

The judge herein recommended that a broad national cease-and-desist Order and notice be posted at all of the Respondent's facilities nationwide. In recommending the broad corporatewide Order, the judge considered the Respondent's extensive history of unfair labor practices. He noted that in *Beverly I,*[15] the Board found that the Respondent had committed some 135 violations at 32 facilities and ordered a broad corporatewide remedy. He further noted that while *Beverly I* was being litigated, unfair labor practice charges and complaints were being filed and issued against the Respondent in the instant case, and that subsequent unfair labor practice charges were being filed and issued against the Respondent in the instant case, and that subsequent unfair labor practice charges and complaints were filed, which formed the basis for consolidated complaint in *Beverly California Corp. (Beverly III),* 326 NLRB No. 30, issued this day. Consequently, the judge found that the Respondent has demonstrated a proclivity to violate the Act. He found further that while the violations at certain facilities herein was not serious, violations at other facilities were substantial.

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[15] *Beverly California Corp.*, 310 NLRB 222 (1993).

Accordingly, the judge concluded that the violations disclose a continued corporate effort by the Respondent to become or remain union free at the expense of its employees' Section 7 rights. In these circumstances, the judge concluded that a broad corporatewide cease-and-desist Order was appropriate.

In *Beverly III,* issued this day, the Board has granted a corporatewide order based on the number and scope of all the violations found in the three cases against this Respondent beginning with *Beverly I,* supra, decided by the Board in 1993. Therefore, the Board finds it unnecessary to grant a broad order in this case.[16] Accordingly, in this proceeding, separate remedial orders will be issued tailored to the violations found at each of the individual facilities.[17]

ORDER

The National Labor Relations Board orders that the Respondent, Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them, its officers, agents, successors, and assigns, shall

I. Pioneer Place facility

I. Cease and desist from

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[16] See *Chicago Tribune Co.*, 318 NLRB 920, 927 (1995) (finding it unnecessary to pass on the judge's finding that the respondent employer unlawfully refused to give certain requested names and addresses to the union, because the employer was under an obligation to furnish the information imposed by the Board's order in an earlier case).

[17] Inasmuch as we are not ordering any extraordinary remedies, we deny the Respondent's motion to reopen the record as moot.

(a) Soliciting employees to form and join organizations to represent them as to their terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Irving, Texas, operating as Pioneer Place facility, copies of the attached notice marked "Appendix I."[18] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 16, 1988.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

II. Fountainview Place facility

1. Cease and desist from

(a) Threatening employees with reprisals for having selected a union as their collective-bargaining representative.

(b) Disciplining or otherwise discriminating against employees for serving as union observers during representation elections under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary actions taken against Lily Davis and Kastle Gannon, and within 3 days thereafter notify them in writing that this has been done and that evidence of their unlawful disciplines will not be used as a basis for future personnel action against them.

(b) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, operating as Fountainview Place facility, copies of the attached notice marked "Appendix II."[19] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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[19] See fn. 18, supra.

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1988.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

III. Liberty House Nursing Home

1. Cease and desist from

(a) Discharging employees because of their activities on behalf of or support for a union, or their participation in other concerted protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Peggy Urban full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge, employee Peggy Urban for any loss of earnings and other benefits as a result of the discrimination

against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of employee Peggy Urban, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Clifton Forge, Virginia, operating as Liberty House Nursing Home, copies of the attached notice marked "Appendix III."[20] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 1988.

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[20] See fn. 18, supra.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IV. Mount Lebanon Manor Convalescent Care Center facility

1. Cease and desist from

(a) Unilaterally changing terms and conditions of employment of employees, including implementing a master schedule, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(b) Failing and refusing to supply the Union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(b) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in the master schedule.

(c) Within 14 days after service by the Region, post at its facility in Mount Lebanon, Pennsylvania, operating as

Mount Lebanon Manor Convalescent Care Center facility, copies of the attached notice marked "Appendix IV".[21] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 5, 1989.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

V. Danbury Pavilion Health Care facility

1. Cease and desist from

(a) Unilaterally changing terms and conditions of employment of employees, including discontinuing short pay policy, without prior notice to or affording an opportunity to bargain with New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

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[21] See fn. 18, supra.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in short pay policy.

(b) Within 14 days after service by the Region, post at its facility in Danbury, Connecticut, operating as Danbury Pavilion Health Care facility, copies of the attached notice marked "Appendix V".[22] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 1989.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

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[22] See fn. 18, supra.

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

VI. West Haven Nursing facility

1. Cease and desist from

(a) Failing and refusing to supply New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(b) Within 14 days after service by the Region, post at its facility in West Haven, Connecticut, operating as West Haven Nursing facility, copies of the attached notice marked "Appendix VI."[23] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility

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[23] See fn. 18, supra.

involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 1989.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

VII. Beverly Manor Convalescent Hospital facility

1. Cease and desist from

(a) Interrogating employees about their union sentiments.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Telling employees that their suspensions are related to their union activity.

(d) Threatening employees with disciplinary action for engaging in lawful union or protected concerted activity.

(e) Discharging or suspending employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nelia Aldape full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge and suspension, employee Nelia Aldape for any loss of earnings and other benefits suffered as a result of the discrimination practiced against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the suspension and discharge of employee Nelia Aldape, and within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Monterey, California, operating as Beverly Manor Convalescent Hospital facility, copies of the attached notice marked "Appendix VII."[24] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate

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[24] See fn. 18, supra.

and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

VIII. Slayton Manor Nursing Home facility

1. Cease and desist from

(a) Soliciting and adjusting employee complaints and grievances during union organizing campaigns.

(b) Posting or promulgating unlawfully broad no-solicitation or no-distribution rules.

(c) Forbidding lawful solicitation or distribution on behalf of unions during nonwork time and in non-patient care areas.

(d) Creating the impression that employees' union activities are under surveillance.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Slayton, Minnesota, operating as Slayton Manor Nursing Home facility, copies of the attached notice marked "Appendix VIII".[25] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the

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[25] See fn. 18, supra.

Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 13, 1989.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IX. Kewaunee Health Care facility

1. Cease and desist from

(a) Threatening employees with disciplinary action for engaging in lawful union or protected concerted activity, including distribution of union literature.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facility in Kewaunee, Wisconsin, operating as Kewaunee Health Care facility, copies of the attached notice marked

"Appendix IX."[26] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 1990.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

X. Beverly Health Care Center facility

1. Cease and desist from

(a) Threatening employees with discharge for engaging in lawful union or protected concerted activity, including strikes and picketing.

(b) Promising benefits, including the recission of disciplinary action for crossing union picket lines to come to work.

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[26] See fn. 18, supra.

(c) Discharging employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Cathy Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of her unlawful discharge, employee Cathy Lewis for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Cathy Lewis and, within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Glasgow, West Virginia, operating as Beverly Health Care Center facility, copies of the attached notice

marked "Appendix X".[27] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material, in the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 1990.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XI. Richland Manor facility

1. Cease and desist from

(a) Conditioning the payment of a wage increase on the withdrawal of unfair labor practice charges.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Johnstown, Pennsylvania, operating as Richland

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[27] See fn. 18, supra.

Manor facility, copies of the attached notice marked "Appendix XI."[28] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 1991.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

XII. Wyoming Valley Health Care facility

1. Cease and desist from

(a) Discharging employees because of their union activities on behalf of a union, or their participation in other concerted protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[28] See fn. 18, supra.

(a) Within 14 days from the date of this Order, offer Christopher Tausch full reinstatement to his former job or, ff that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of his unlawful discharge, employee Christopher Tausch for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Christopher Tausch, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wilkes-Barre, Pennsylvania, operating as Wyoming Valley Health Care facility, copies of the attached notice marked "Appendix XII."[29] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall

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[29] See fn. 18, supra.

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XIII. Sanger Hospital facility

1. Cease and desist from

(a) Threatening employees with reprisals for having selected a union as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Sanger, California, operating as Sanger Hospital facility, copies of the attached notice marked "Appendix XIII."[30] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to

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[30] See fn. 18, supra.

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 1991.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XIV. Beverly Manor facility

1. Cease and desist from

(a) Interrogating employees about their union sentiments.

(b) Soliciting employees to sign and/or circulate de-certification petitions.

(c) Assaulting union representatives or delegates.

(d) Telling employees that union representatives or delegates will be killed.

(e) Discharging employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Johnny Scott full reinstatement to his former job or, if that job

no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of his unlawful discharge, employee Johnny Scott for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Johnny Scott and, within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Francisco, California, operating as Beverly Manor facility, copies of the attached notice marked "Appendix XIV".[31] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the

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[31] See fn. 18, supra.

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XV. Duke Convalescent facility

1. Cease and desist from

(a) Creating the impression that employees' union activities are under surveillance.

(b) Threatening employees with disciplinary action and/or discharge for engaging in lawful union or protected concerted activity.

(c) Ordering them to remove from the facility all of employee coffee mugs bearing union logos.

(d) Discharging, suspending, or imposing any disciplinary action on employees, including written warnings, because of their activities on behalf of a union, or their participation in other concerted protected activity.

(e) Forbidding lawful solicitation or distribution on behalf of unions during nonwork time and nonpatient care area.

(f) Interrogating employees about their union sympathies.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Amy Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole, commencing from the date of their unlawful discharge or suspension of employees Amy Johnson and Valerie Faulkner for any loss of earnings and other benefits suffered as a result of the discriminations practiced against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharges or suspensions of Amy Johnson and Valerie Faulkner and, within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lancaster, Pennsylvania, operating as Duke Convalescent facility, copies of the attached notice marked "Appendix XV."[32] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the

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[32] See fn. 18, supra.

Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XVI. Carpenter Care Center facility

1. Cease and desist from

(a) Discharging, suspending, or imposing any disciplinary action on employees, including written warnings, oral warnings, or transfers because of their activities on behalf of a union, or their participation in other concerted protected activity.

(b) Unilaterally changing terms and conditions of employment of employees, including implementing changes in its policy of immediately reimbursing employees for the purchase of prescription drugs, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(c) Failing and refusing to supply any union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove the unlawful disciplinary actions taken against Lily Davis, Kastle Gannon, Alice Adams, Esther Bennett, Charles Benninger, Amanda Bradish, Jennifer Buckingham, Patt Cart, Suzanne Clearwater, Betty Cona, Helen Evans, Carolyn Ferguson, Antoinette Gorko, Donna Hollister, Karen Holsopple, Sharon Karp, Herman Kathi, Lori King, Deborah Kintner, Dawn Kisner, Linda Krill, David Lewis, Marie Meador, Dorothy Moskowitz, Debra Redmond, Chris Sheridan, Lorraine Zelenka, and Mary Zone, and, within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(b) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(c) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before making any changes in its policy of immediately reimbursing employees for the purchase of prescription drugs.

(d) Upon request, rescind the unilateral discontinuance of its policy of immediately reimbursing employees for the purchase of prescription drugs.

(e) Within 14 days after service by the Region, post at its facility in Funkhannock, Pennsylvania, operating as Carpenter Care Center facility, copies of the attached notice marked "Appendix XVI."[33] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XVII. Stroud Manor facility

1. Cease and desist from

(a) Soliciting and adjusting employee complaints and grievances during union organizing campaigns.

(b) Promising to expedite the receipt of employee benefits, including tuition reimbursement.

(c) Unilaterally changing terms and conditions of employment of employees, including withholding annual wage

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[33] See fn. 18, supra.

increases, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by its employees as their collective-bargaining representative, including bargaining before withholding annual wage increases.

(b) On request by the Union, reinstate annual wage increases.

(c) Make whole, the employees for any monetary losses they may have suffered by reason of the Respondent's unilateral withholding of annual wage increases which the employees would have received in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in East Stroudsburgh, Pennsylvania, operating as Stroud Manor facility, copies of the attached notice marked

"Appendix XVII."[34] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 30, 1991.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

XVIII. Valley Care and Guidance Center facility

1. Cease and desist from

(a) Interrogating employees about their union sentiments.

(b) Soliciting employees to sign and/or circulate de-certification petitions.

(c) Telling employees that union organization is futile.

(d) Demanding immediate repayment of loans in retaliation for joining a union.

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[34] See fn. 18, supra.

(e) Telling employees that other employees had been solicited and paid to vandalize the property, including automobiles, of union supporters.

(f) Failing and refusing to supply Hospital and Healthcare Workers, Local 250, SEIU, AFL-CIO-CLC representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(g) Failing and refusing to bargain in good faith, and withdrawing recognition from the Union selected by its employees as their collective-bargaining representative.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith concerning wages, hours, and other forms and conditions of employment with the Union selected by its employees as their collective-bargaining representative.

(b) On request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(c) Within 14 days after service by the Region, post at its facility in Fresno, California, operating as Valley Care and Guidance Center facility, copies of the attached notice marked "Appendix XVIII."[35] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places

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[35] See fn. 18.

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 31, 1991.

Dated, Washington, D.C. August 21, 1998

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Sarah M. Fox, Member

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Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN GOULD, dissenting in part.

I do not agree with my colleagues that the Respondent violated Section 8(a)(1) at the Pioneer Place facility at Irving, Texas, when it solicited employees to form and join an employee council. Unlike my colleagues, I would remand for a hearing the allegation that the Respondent violated Section 8(a)(5) when at the Mount Lebanon Manor Convalescent Care Center, Mount Lebanon, Pennsylvania, it unilaterally implemented a master schedule. Finally, unlike my colleagues, I would order a nationwide broad cease-and-desist

order and a nationwide notice posting. The following is my discussion of these issues.[1]

1. Contrary to my colleagues, I find that the Respondent did not violate Section 8(a)(l), at the Pioneer Place facility in Irving, Texas, by soliciting employees to form and join an employee council and by posting notices to implement the selection of employee participants.

I have long supported the formation of employee participation committees because they can lead to cooperation and democracy in the workplace.[2] In order to encourage the formation of such committees, the Act allows employers and employees to explore cooperative efforts without the fear that one error or isolated incident will transform a genuine attempt to cooperate into the unlawful domination of a labor organization.[3]

Under these principles, I would find that the Respondent did not violate the Act by announcing the plan for an employee council and soliciting employees to join it. Newly hired personnel administrator, Sherry Copeland, proposed establishing an employee council, consisting of representatives from the various departments, who would

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[1] In agreeing with my colleagues that the Respondent at the Duke Convalescent facility unlawfully interrogated open union supporters employees Valerie Faulkner and Harry Brooks concerning their union sympathies, I would, as more fully set forth in *Beverly Enterprises,* 322 NLRB 334 fn. 1 (1996), reverse *Rossmore House,* 269 NLRB 1176 (1984).

[2] See my concurrence in *Keeler Brass Co.*, 317 NLRB 1110, 1117 (1995).

[3] *Stoody Co.*, 320 NLRB 18, 20 (1995) (my separate statement at fn. 10).

discuss the problems among themselves and with Copeland in the hope of resolving them. Although the council, as envisioned, might have engaged in the pattern and practice of dealing with the Respondent concerning working conditions in violation of Section 8(a)(2),[4] the Respondent abandoned its plan for the council almost immediately. It did so because it ascertained that it was possibly unlawful. Also, the Respondent was acting in good faith by attempting to resolve, in a cooperative manner, the bad feelings among employees. Further, there is no evidence that the Respondent was attempting to interfere with or undermine the employees' collective-bargaining representative.[5] In these circumstances, I would dismiss this allegation.

2. Contrary to my colleagues, I would remand for a further hearing regarding the allegation that the Respondent violated Section 8(a)(5) by unilaterally implementing a master work schedule at the Mount Lebanon Manor Convalescent Center, in Mount Lebanon, Pennsylvania. The management-rights clause gives the respondent the right to "schedule its operations and work force." It is ambiguous as to whether this clause gives the Respondent the right to reduce the working hours of unit employees. Thus, I would remand to receive additional evidence, such as the parties' past practice and bargaining history, to determine whether the Respondent was privileged by the management-rights clause to make the change.[6]

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[4] See *E. I. duPont & Co.*, 311 NLRB 893 (1993).

[5] *Stoody Co.*, supra (my separate statement at fn. 13.)

[6] I have serious reservations about the clear and unmistakable waiver standard under the circumstances of this case.

3. Unlike my colleagues, I would issue a broad nationwide cease-and-desist order and a nationwide posting at all of the Respondent's facilities.

The decision in *Beverly III*[7] spells out in detail the reasons for the nationwide broad cease-and-desist order and the nationwide posting. That rationale is obviously equally applicable to *Beverly II*. Yet, for reasons that are incomprehensible to me, my colleagues have chosen to limit the order in *Beverly II*. The only possible explanation is that *Beverly II* comes before *Beverly III*. The fact is, however, that these two cases are being decided at the same time and that the conduct in *Beverly III* is simply a continuation of the same pattern of conduct present in *Beverly I* (310 NLRB 222 (1993)) and *Beverly II*. In these circumstances, I see no reason why the Board should not consider the conduct in *Beverly III* in deciding the appropriate remedy in *Beverly II*. I would grant the same nationwide broad cease-and-desist order in both *Beverly II* and *Beverly III*.[8]

Dated, Washington, D.C. August 21, 1998

William B. Gould IV, Chairman

A remand would permit the Board to address the issue on the basis of a full and complete record.

[7] 326 NLRB No. 30 (issued this date).

[8] Further, I agree with the judge that the combined effect of the violations in *Beverly I* and *Beverly II*, without considering the violations found in *Beverly III*, is sufficient to warrant such an order.

NATIONAL LABOR RELATIONS BOARD

APPENDIX I

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit employees to form and join organizations to represent them as to their terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM.

APPENDIX II

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with reprisals for having selected a union as their collective-bargaining representative.

WE WILL NOT discipline or otherwise discriminate against employees for serving as union observers during representation elections under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary actions taken against Lily Davis and Kastle Gannon, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful disciplines will not be used against them in any way.

BEVERLY CALIFORNIA CORPORATION
F/K/A BEVERLY ENTERPRISES, ITS
OPERATING DIVISIONS, REGIONS,
WHOLLY-OWNED SUBSIDIARIES AND
INDIVIDUAL FACILITIES AND EACH OF
THEM

APPENDIX III

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because of their activities on behalf of or support for a union, or their participation in other concerted protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employee Peggy Urban full reinstatement to her job position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of her unlawful discharge, employee Peggy Urban for any loss of earnings and other benefits suffered resulting from her discharge, less any net earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Peggy Urban, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX IV

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change terms and conditions of employment of employees, including implementing a master schedule, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

WE WILL NOT fail and refuse to supply the Union representing our employees, on request, with information necessary and relevant to its collective-bargaining functions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

WE WILL, on request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by our employees as their collective-bargaining representative, including bargaining before making any changes in the master schedule.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX V

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change terms and conditions of employment of employees, including discontinuing short pay policy, without prior notice to or affording an opportunity to bargain with New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by our employees as their collective-bargaining representative, including bargaining before making any changes in short pay policy.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX VI

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to supply New England Healthcare Employees Union, District 1199/S.E.I.U., AFL-CIO representing our employees, on request, with information necessary and relevant to its collective-bargaining functions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND

INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX VII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees about their union sentiments.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT tell employees that their suspensions are related to their union activity.

WE WILL NOT threaten employees with disciplinary action for engaging in lawful union or protected concerted activity.

WE WILL NOT discharge or suspend employees because of their activities on behalf of a union, or their participation in other protected concerted activity.

WE WILL, within 14 days from the date of the Board's Order, offer Nelia Aldape full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of her unlawful suspension and discharge, employee Nelia Aldape for any loss of earnings and other benefits suffered

resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge or suspension of Nelia Aldape, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge or suspension will not be used against her in any way.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX VIII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit and adjust employee complaints and grievances during union organizing campaigns.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT post or promulgate unlawfully broad no-solicitation or no-distribution rules.

WE WILL NOT forbid lawful solicitation or distribution on behalf of unions during nonwork time and in nonpatient care areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX IX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with disciplinary action for engaging in lawful union or protected concerted activity, including distribution of union literature.

WE W1LL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX X

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE W1LL NOT threaten employees with discharge for engaging in lawful union or protected concerted activity, including strikes and picketing.

WE WILL NOT promise benefits, including recission of disciplinary action for crossing union picket lines to come to work.

WE WILL NOT discharge employees because of their activities on behalf of a union, or their participation in other concerted protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cathy Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially

equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of her unlawful discharge, employee Cathy Lewis for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Cathy Lewis, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XI

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT condition the payment of a wage increase on the withdrawal of unfair labor practice charges.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees for their activities on behalf of or support for a union, or their participation in other concerted protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Christopher Tausch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his

seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of his unlawful discharge employee Christopher Tausch for any loss of earnings and other benefits suffered resulting from discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Christopher Tausch, and WE W1LL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BEVERLY CALIFORNIA CORPORATION
F/K/A BEVERLY ENTERPRISES, ITS
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THEM

APPENDIX XIII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with reprisals for having selected a union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XIV

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees about their union sentiments.

WE WILL NOT solicit employees to sign and/or circulate decertification petitions.

WE WILL NOT assault union representatives or delegates.

WE WILL NOT tell employees that union representatives or delegates will be killed.

WE WILL NOT discharge employees because of their activities on behalf of a union, or their participation in other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Johnny Scott full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of his unlawful discharge, Johnny Scott for any loss of earnings and other benefits suffered resulting from discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Johnny Scott, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BEVERLY CALIFORNIA CORPORATION
F/K/A BEVERLY ENTERPRISES, ITS
OPERATING DIVISIONS, REGIONS,
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INDIVIDUAL FACILITIES AND EACH OF
THEM

APPENDIX XV

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT threaten employees with disciplinary action and/or discharge for engaging in lawful union or protected concerted activity.

WE WILL NOT order the removal from the facility of employee coffee mugs bearing union logos.

WE WILL NOT discharge, suspend, or impose any disciplinary action on employees, including written warnings, because of their activities on behalf of or support for a union, or their participation in other concerted protected activity.

WE WILL NOT forbid lawful solicitation or distribution on behalf of unions during nonwork time and non-patient care areas.

WE WILL NOT interrogate employees about their union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employee Amy Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make whole, commencing from the date of their unlawful discharges or suspensions as the case may be, the employees Amy Johnson and Valerie Faulkner, unlawfully suspended for any loss of earnings and other benefits suffered

resulting from their discharges or suspensions, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and suspensions of Amy Johnson and Valerie Faulkner, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges and suspensions will not be used against them in any way.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XVI

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT impose any disciplinary action on employees, including written warnings, oral warnings, or transfers because of their activities on behalf of a union, or their participation in other concerted protected activity.

WE WILL NOT unilaterally change terms and conditions of employment of employees, including implementing changes in our policy of immediately reimbursing employees for the purchase of prescription drugs, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

WE WILL NOT fail and refuse to supply the Union representing our employees, on request, with information necessary and relevant to its collective-bargaining functions, including bargaining before making any changes in its policy of immediately reimbursing employees for the purchase of prescription drugs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unilateral discontinuance of our policy of immediately reimbursing employees for the purchase of prescription drugs.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary actions taken against Lily Davis and Kastle Gannon, Alice Adams, Esther Bennett, Charles Benninger, Amanda Bradish, Jennifer Buckingham, Patt Carr, Suzanne Clearwater, Betty Cona, Helen Evans, Carolyn Ferguson, Antoinette Gorko, Donna Hollister, Karen Holsopple, Sharon Karp, Herman Kathi, Lori King, Deborah Kintner, Dawn Kisner, Linda Krill, David Lewis, Marie Meador, Dorothy Moskowitz, Debra Redmond, Chris Sheridan, Lorraine Zelenka, and Mary Zone, and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their unlawful disciplines will not be used against them in any way.

WE WILL, on request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

WE WILL, on request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by our employees as their collective-bargaining representative, including bargaining before making any changes in our policy of immediately reimbursing employees for the purchase of prescription drugs.

BEVERLY CALIFORNIA CORPORATION
F/K/A BEVERLY ENTERPRISES, ITS
OPERATING DIVISIONS, REGIONS,
WHOLLY-OWNED SUBSIDIARIES AND

INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XVII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit and adjust employee complaints and grievances during union organizing campaigns.

WE WILL NOT promise to expedite the receipt of employee benefits, including tuition reimbursement.

WE WILL NOT unilaterally change terms and conditions of employment of employees, including withholding annual wage increases, without prior notice to or affording an opportunity to bargain with District 1199P, National Union of Hospital and Healthcare Employees, SEIU, AFL-CIO selected by employees in the appropriate unit as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with any union selected by its employees as their collective-bargaining representative, including bargaining before withholding annual wage increases.

WE WILL, on request by the Union, reinstate annual wage increases.

WE WILL make whole the employees in the appropriate unit for any losses they may have suffered by reason of the unilateral withholding of annual wage increases which employees would have received.

BEVERLY CALIFORNIA CORPORATION
F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

APPENDIX XVIII

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees about their union sentiments.

WE WILL NOT solicit employees to sign and/or circulate decertification petitions.

WE WILL NOT tell employees that union organization is futile.

WE W1LL NOT demand immediate repayment of loans in retaliation for joining a union.

WE WILL NOT tell employees that other employees had been solicited and paid to vandalize the property, including automobiles, of union supporters.

WE WILL NOT fail and refuse to supply Hospital and Healthcare Workers, Local 250, SEIU, AFL-CIO-CLC representing our employees, on request, with information necessary and relevant to its collective-bargaining functions.

WE WILL NOT fail and refuse to bargain in good faith, withdraw recognition from the Union selected by our employees as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

WE WILL, on request, recognize and bargain in good faith concerning wages, hours, and other terms and conditions of employment with the Union selected by our employees as their collective-bargaining representative.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

J. O. Dodson, Esq., Joanne Krause, Esq., Richard J. Simon, Esq., Robert Droker, Esq., Jane P. North, Esq., Michael A. Marcionese. Esq., Gary Connaughton, Esq., Barton A. Myers, Esq., Kim R. Siegert, Esq., Thomas E. Quigley, Esq., Donald A. Becher, Esq., Ariel Sotolongo,

Esq., Peter C. Verrochi, Esq., Mark E. Arbesfeld, Esq., Rocky Coe, Esq., A. Marie Simpson, Esq., Henry E. Proms, Esq., and Margaret M. Dietz, Esq., for the General Counsel.

Donald L. Dotson, Esq., Michael R. Flaherty, Esq., and Kathleen L. Achterhoff Esq., of Fort Smith, Arkansas, David S. Durham, Esq., of San Francisco, California, *Margie Case, Esq.,* of Raleigh, North Carolina, *Simao J. Avila, Esq., and Teresa L. Butler, Esq.,* of Fresno, California, *Warren M. Davidson, Esq.,* of Baltimore, Maryland, *and Derek Woodhouse, Esq.,* of San Jose, California, for the Respondent.

Jonathan Hiatt, Esq., of Washington, D.C.,[1] and *Herbert Silberman, Esq.,* of Washington, D.C., for Service Employees' International Union.

Douglas Young, Esq., of Austin, Texas, for Local 606, Service Employees' International Union.

Randy Girer, Esq., of San Francisco, California, and *Mike Guidry, Field Representative,* of Fresno, California, for Local 250, Hospital and Health Care Workers Union.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charges, which were filed by Peggy M. Urban and Gladys Hahn, individuals, and by the various labor organizations set out above, allege violations of the National Labor Relations Act (the Act) against Beverly California

[1] By letter dated September 29, 1993, Jonathan Hiatt, general counsel for the SEIU, withdrew as counsel for New England Health Care Employees, District 1199/SEIU, AFL-CIO.

Corporation f/k/a Beverly Enterprises, Its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them (Beverly, Respondent, or the Employer), at 21 nursing home facilities in seven States. On August 20, 1991, a consolidated complaint was issued and thereafter amended at various dates set out in the record. That consolidated complaint and the amendments thereto are referred to collectively as the complaint.

In addition to the issues raised by the unfair labor practice allegations at the various individual facilities, Respondent is also contesting both the "single employer" allegation of the complaint, and the General Counsel's request that any relief include a nationwide Order including each and everyone of the Respondent's facilities. A hearing on these matters was held on all these matters before me on various dates from November 12, 1991, through March 26, 1993. Briefs have been timely filed by the General Counsel, Respondent, and the Service Employees International Union (SEIU) and affiliated Local Unions.

FINDINGS OF FACT[2]

[2] There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities; the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistences within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of witnesses, I rely specifically on their demeanor and have made my findings accordingly. But apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Walker's,* 159 NLRB 1159, 1161 (1966).

1. EMPLOYER'S BUSINESS

A. *Jurisdiction*

The complaint alleges that Respondent, a California corporation, is engaged in the ownership and operation of health care facilities throughout the United States, providing nursing home services and professional care to the elderly, sick, and infirm, and that during the 12-month period ending December 31, 1989, Respondent, through its nursing home operating divisions, regions, wholly-owned subsidiaries, and individual facilities named in the complaint, and each of them, in the course and conduct of their operations, derived gross revenues in excess of $500,000, and that Respondent purchased and received at the various facilities named in the complaint goods and materials valued in excess of $5000 directly from points outside the States in which the nursing home facilities are located. Based on these facts, which are admitted in Respondent's answer, I conclude that each of the individual facilities named in the complaint meet the Board's standards for the assertion of jurisdiction.

B. *Single Employer*

1. Facts

The complaint alleges that Respondent and its nursing home operating divisions, regions, wholly-owned subsidiaries, and individual facilities constitute a single integrated business operation and a single employer within the meaning of the Act. Respondent denies single-employer status.

Respondent, Beverly California Corporation, is a California corporation, formerly known as Beverly

Enterprises. As a result of a merger in 1987, it became part of Beverly Enterprises, Inc., a holding company with other holdings in the health care industry. Presently, Respondent either owns, manages, or leases approximately 846 nursing homes in 34 States and the District of Columbia. This number varies over time with acquisitions and sales.

Prior to 1989, Respondent's organizational structure consisted of five divisions covering the United States, i.e., western, central, eastern, southern, and Texas, with corporate headquarters in Pasadena, California. In 1989, Respondent reorganized its national corporate structure into 11 regions, later reduced to 10. Corporate headquarters was relocated to Fort Smith, Arkansas.

Overall responsibility for corporate operations resides in Board Chairman and CEO David Banks. With respect to Respondent's operations, each of the 10 regions is managed by a regional vice president for operations who reports to executive vice president operations, Boyd Hendrickson, who in turn reports to Banks. Within each region, there are a number of area managers who are responsible for some 6 to 12 individual nursing home facilities in that geographical area. They report to their respective regional vice presidents for operations. Individual nursing home facilities are the responsibility of an administrator who reports to the area manager in the chain of command. In addition to operations, at the same level as Hendrickson, there are senior or executive vice presidents for development, quality assurance, administration, finances, and a corporate treasurer, all of whom report to Banks.

With respect to the single-employer issue, a review of the record discloses the existence of common ownership of the individual facilities by Respondent. Indeed, Respondent, in its answer, concedes common ownership and more, by admitting

those portions of the complaint alleging that Respondent and its subsidiaries, including the individual facilities, are "affiliated business enterprises with common officers, ownership, directors" and that they "have provided services for each other," while at the same time denying allegations of common "management and supervision"; having "formulated or administered a common labor policy affecting employees of said operations"; "shared common premises and facilities"; "interchanged personnel with each other"; or "held themselves out to the public as a single-integrated business enterprise and a single employer within the meaning of the Act."[3]

In addition to what is conceded by Respondent, the record discloses a high degree of functional integration between all levels of the corporate hierarchy. Corporate policy in every area is formulated at the corporate level affecting operations at every facility.

Specifically, regarding finance, Respondent's corporate finance computer center at Virginia Beach, Virginia (Corporate East), performs payroll, accounting, billing, and various other financial services for all of the facilities. As for quality assurance, a quality control program is in effect that is developed, managed, and controlled at the corporate level and implemented in all of the facilities to assure that corporate standards of quality patient care are administered uniformly in all of the facilities, and the facilities are monitored by corporate supervision to insure compliance. In addition, a corporate "hot line" is maintained in Fort Smith to field and resolve complaints from employees, patients, and family members. If a complaint involves patient care, from whatever

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[3] In *Beverly Enterprises*, 310 NLRB 222, decided January 29, 1993 *(Beverly I)*, Respondent admitted single-employer status.

facility, corporate quality assurance has the responsibility of investigating and, when appropriate, taking any corrective action required to resolve the matter.

Marketing is another example of corporate involvement in the affairs of the individual facilities. Marketing strategies are developed at the corporate level to improve the economic performance of the individual facilities. These strategies are targeted to and implemented at the facility level. Another example of corporate direction and control is found in the formulation and application of employee benefits. Employee benefits such as medical insurance, life insurance, and 401(k) plans, to mention a few, are determined at the corporate level and made available to Respondent's employees at all the facilities. These areas of corporate activity are by no means exhaustive but are sufficient to disclose a high degree of direct involvement by Respondent in the affairs of the individual facilities.

The record also discloses a high degree of interrelated corporate activity in the area of employee and labor relations. At the corporate level, there is Vice President Human Resources Carol Johanson whose responsibility it is to administer and coordinate the human resources needs of the regions, areas, and individual nursing homes. To this end, meetings are arranged and conducted by Johanson with regional directors for human resources and other management personnel to keep them abreast of Federal laws and regulations affecting the human resources function. Johanson is also directly involved in formulating and implementing corporate policy at the local level. To this end, corporate human resources has formulated and distributed a human resources manual for use at each of the facilities, as well as initiating and developing a program reducing from about 50 to 8 the total number of employee handbooks used at

Respondent's facilities in order to provide greater uniformity in employee relations.

In addition to Johanson's function, overall direct responsibility for supervising and administering corporate human resources policy within the various regions is vested primarily in the I0 regional vice presidents for operations who report to Hendrickson.[4] Within each region, responsibility for labor relations and the entire human resources function rests with the regional directors for human resources (RDHR) who report to the regional vice president operations. Each RDHR has several human resources representatives who report to him. It is the regional human resources representatives who have the direct hands-on responsibility to supervise adherence to corporate labor relations policies and procedures at the various nursing home facilities. Dealings with the NLRB and other employee-oriented agencies, such as OSHA, are normally conducted by regional human resources, although higher authorities are normally contacted. When appropriate, advice from other corporate departments is sought, particularly from the office of the senior vice president and general counsel and specifically the labor counsel within that office. Whenever a union conducts an organizational effort at any of the facilities, any corporate response or campaign to resist is undertaken primarily by regional human resources. The staff of regional human resources also trains the staff at the individual facilities on how to conduct themselves during organizational campaigns in order to promote the Company's position and avoid any unlawful activity. In circumstances when the facilities are already organized, regional human

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[4] Johanson and the vice presidents operations report to Hendrickson and are at the same vice president level of the corporate hierarchy.

relations has the basic responsibility for conducting contract negotiations, executing contracts, and handling grievances that progress beyond local resolution to the third step of the grievance procedures. Thereafter, the grievances, including arbitrations, are handled by regional human relations.

2. Discussion and analysis

The standard for determining single-employer status has been set by the Supreme Court of the United States in *Radio & Television Broadcast Technicians Local 1264,*[5] wherein the Court concluded that in deciding whether or not two or more employers constitute a single employer within the meaning of the Act, it would look to four basic factors, to wit: (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations.

Observing these criteria, there would appear to be little doubt, based on this record, that the Respondent, together with its regions and nursing home facilities, comprise a single employer within the meaning of the Act. Respondent argues that these entities are not a single employer, however, because the individual facilities are "individual profit centers" and that each is self-sufficient and exercises control of its own day-to-day operations in matters of hiring, discipline, discharge, scheduling, shift assignment, and job responsibility.

In reviewing the Respondent's position in light of the record, it is true, as Respondent contends, that normally, hire, discipline, and discharge of employees is accomplished at the

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[5] *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

individual facility level. The individual facilities are also responsible for patient care, on a day-to-day basis, and matters incident thereto. It is also true that it is the facility, rather than the area, region, or corporate, that schedules staff to work the various shifts and assigns responsibilities to the individual employees. In the matter of expenditures, as Respondent points out, the individual facility administrators may enter binding contracts in amounts of less than $5000 on behalf of the Respondent. Expenditures in greater amounts, however, require progressively higher corporate approval.

With respect to budgets, Respondent argues that the individual facility "establishes" its own budget, and has sole responsibility for how the money is spent. The reality, however, is more confining. Although the facilities all submit proposed budgets, these are reviewed and subject to modification and approval at area, region, and corporate level before being approved.

Respondent also contends that the individual facilities have the "final word" regarding proposals for discussion in contract negotiations at organized facilities. The record discloses, however, that the regional human resources representative is Respondent's principal spokesperson negotiating the contract. Although they may consult with facility administrators, the record is totally insufficient to establish that administrators are free to disregard corporate concerns or to make or accept proposals on their own. Corporate approval is necessary for the execution of any collective- bargaining agreement. Collective-bargaining agreements are executed by the regional directors for human resources, not administrators, on behalf of Respondent.

In the administration of the labor contract, the facility has local authority to resolve grievances at the early steps of the grievance procedures. Grievances taken to higher steps,

however, including arbitration, are handled by regional human resources.

Respondent argues that although the region provides training forms and makes policies and procedures for individual facilities, these are only guides, and their use by the facilities is optional. The record does not support this contention. Although it is true that corporate does not demand uniformity in all activity at every facility, the exceptions are limited. Commonsense exceptions are dictated by the fact that facilities' needs are not all identical and limited departures are acceptable, and even necessary, in the day-to-day operations of the facilities.

The contention that individual facilities are autonomous or even self-sufficient is simply not supported by this ample record. When operational directives come from corporate, the corporate expectation is, that apart from exceptional circumstances, there will be conformity by the facilities, particularly in the area of human resources. The record fully supports the conclusion that wherever possible, corporate sought uniform and consistent application of corporate policy. For example, in the matter of employee handbooks, corporate reduced the some 50 number of handbooks in use at the various facilities to 8. Complete uniformity of employee relations with a single-employee handbook, although desirable, was not feasible because local conditions required some flexibility. To allow some flexibility in the application of corporate policy, in circumstances where a corporation is administering over 800 facilities, seems reasonable.

To summarize, Respondent contends that corporate and regional are not involved in a day-to-day operation of the nursing homes, but the record does support this contention. Even the routine day-to-day operations are carried out under

the broad direction and supervision of the corporate structure, with corporate responsibility from top to bottom. The chain of command runs from Banks, to the executive vice president operations (EVP-operations) at the corporate level, to regional vice presidents operations (VPOs), to area managers, to administrators with RDHRs reporting to regional VPOs. Of course, the individual facility is, as the Respondent suggests, the "profit center," but the facility's operations are conducted with corporate supervision and responsibility from top to bottom. Indeed, the individual facility does represent the bottom line for the Respondent. This is why the facilities' performances are closely supervised under a corporate hierarchy.[6] In summary, I conclude that all of the criteria set out in *Radio & Television Broadcast Technicians Local 1264,* supra, have been met and the record fully supports the conclusion alleged in the complaint that Respondent and its subordinate entities are a single-integrated business enterprise, and a single employer within the meaning of the Act.

II. LABOR ORGANIZATIONS

The complaint alleges, the Respondent admits, and 1 find that the various Unions enumerated in the complaint are labor organizations within the meaning of Section 2(5) of the Act.

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[6] Respondent's contention that *Los Angeles Newspaper Guild Local 69 (Hearst Corp.),* 185 NLRB 303, 304 (1970), and *Teamsters Local 391 (Vulcan Materials),* 208 NLRB 540 (1974), serve as precedent for its position is not well taken. Those were 8(b)(4) cases in which the issue to be resolved was whether or not certain divisions within a corporation were "persons" within the meaning of Sec. 8(b)(4). They have no precedential value in resolving the single employer issue presented herein.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Pioneer Place Facility, Irving, Texas*

Statement of the Case

The complaint, with respect to the above-captioned case, alleges violations of Section 8(a)(l) of the Act by Respondent in unlawfully soliciting employees to form and join an employee council to represent employees concerning their problems and complaints; by posting a notice announcing election for an employee council and soliciting employees to be candidates; and by soliciting employees to resign from union membership.[7] The complaint also alleges in paragraph 2 violations of Section 8(a)(l) by informing employees that Respondent was seeking to remove the Union as their representative at the facility; informing employees that they could not be given a wage increase because of the presence of the Union as their representative; and informing employees that a wage increase was being prevented by disputes with the Union, which would cease when the Union was removed as their representative at the facility. The General Counsel adduced no evidence to support the allegations of paragraph 2 of the complaint and moved at the hearing to leave the record open until the dose of the entire hearing or, in the alternative, for 30 days, in order to locate a witness, presumably to support those allegations. That motion was denied by me and, accordingly, no evidence having been adduced regarding the allegations of paragraph 2 of the

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[7] Par. 4 of the complaint was amended at the hearing to substitute the words "On or about mid-March to mid-May" for the words "In or about mid-May."

complaint, I shall recommend the dismissal of those allegations.

I. Facts

The administrator at the Pioneer Place facility, at all times relevant, was Charles Laurent. The DON[8] was Melinda Clark Steible and the personnel administrator, hired by Laurent in January 1988, was Sherry Copeland. The service employees at Pioneer Place, those involved in the instant case, have been represented under contract at all times relevant to this case by Service Employees International Union, Local 606, AFL-CIO (the Union) pursuant to a certification by the Board dated May 2, 1986.[9]

After Copeland was hired, she observed squabbling and conflict among the employees over work-related duties. For example, complaints that one shift was leaving work undone that would have to be done by the following shift. It occurred to Copeland that these conflicts and the bad feelings that they generated could be reduced by establishing an employee council consisting of representatives from the various departments, i.e., nurses aides, laundry, dietary, and maintenance. The purpose of the employee council would be

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[8] The following position titles are common to many of the facilities, and the following abbreviations will be used for them in the body of the decision: certified nursing assistant or aide, CNA; director of nursing, DON; assistant director of nursing, ADON; nurses aide, NA; registered nurse, RN; licensed practical nurse, LPN; and licensed vocational nurse, LVN.

[9] Decertification petitions were filed on August 15, 1988, and on May 4, 1989, both of which are presently blocked by the unfair labor practices alleged in the instant complaint.

to discuss the differences among themselves and with Copeland in the hope of resolving them. She discussed this with Laurent who approved the proposal as a method to get the shifts working together as a team.

A meeting of the day-shift employees was set for March 15, 1988, at 2 p.m. The meeting began with Clark, who congratulated the employees for their work and recent successful state inspection. After this, Laurent made a $25 attendance award to an employee and then announced, to the some 20 assembled employees, the formation of the employee council with representatives from the various departments serving thereon and told them that Copeland would give them the details.

At this time, Copeland spoke concerning the employee council. She advised those present that the employees themselves would be selecting representatives from each department and outlined the responsibilities of those representatives selected. She told them that she would be posting a notice providing the opportunity for employees to nominate their representatives.

On the following day, notices were posted soliciting employees to nominate employees from the various departments to serve as representatives to the employee council and setting out "Qualifications" and "Responsibilities" for those elected. Soon thereafter, Laurent spoke by telephone to Vincent Shepard, human resources (HR) representative for the Texas division, who advised him that Pioneer was a union facility whose employees were represented under contract by the Union and that such an organization as the employee council should not be formed. Laurent heeded this counsel.

After about 4 days, the notices were removed.[10] Employees, however, were never advised that the effort to form the employee council was being abandoned. It is not disputed that no grievance under the contract was filed over the employee council.

Concerning the solicitation to resign from the Union, Margie Cepeda, a CNA and union shop steward, testified that the collective-bargaining agreement provided two times during each calendar year for the parties to resign from the Union, one in April and another in November. Cepeda testified that on some 10 or 11 occasions just prior to those times, Laurent told her she could get out at those times, asked her whether she was going to get out of the Union, and she replied that that she did not know. According to Cepeda, Laurent said that he could not understand why the CNAs could not save money and that the $11 per month they paid as union dues was a waste of money.

Cepeda also testified that prior to the spring resignation option period, in or about March 1988, Melinda Steible, DON, also asked her if she was going to quit the Union and said that the Union was a waste of time. Cepeda testified that she said she did not know.

Laurent, on the other hand, testified that Cepeda had approached him several times complaining that she was in the middle between Oral Fitzsimmons, union business representative, and the Company and wanted to know how to get out of it. Laurent told her that it was impossible, because

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[10] Although some of the CNAs called by the General Counsel testified that the posting lasted somewhat longer than that, I am persuaded that the corroborated testimony suggests a posting period of about 4 days.

she was a shop steward, and further responded that the contract provided two time periods each year when she could withdraw from the Union, and that she did have this option. Laurent denied ever asking her to get out of the Union or asking her if she was going to get out of the Union.

Steible testified in a similar fashion to the effect that Cepeda complained to her about being in the middle between the Union and the Company and told her that it was up to her to decide what to do, neither recommending nor suggesting to her that she resign from the Union.

2. Analysis and recommendations

It is a violation of Section 8(a)(2) of the Act for an employer to interfere with the administration of a labor organization. It is clear that had Respondent finalized its plan to form the employee council, the formation of that group, for its express purpose of dealing with employee complaints in that workplace, would have violated Section 8(a)(2) of the Act. In the instant case, the plan was announced, representatives were solicited, but on the advice of HR, it was dropped. Nonetheless it was unlawful even to solicit employees to serve as representatives for such an unlawful purpose.

Respondent argues that the employees were told by Laurent that the employee council would not "circumvent or negate" the contractual grievance procedure. Even assuming that this statement was made, it is apparent from review of the record that the employee committee was being formed for the purpose of resolving employee complaints concerning their working conditions. These are matters within the exclusive province of the unit employees' collective-bargaining representative, and any effort by an employer to establish a

committee of employees to resolve these problems violate Section 8(a)(1) of the Act. Nor is the fact that the employee council was never formed persuasive, the 8(a)(l) violation is made out by announcing the plan and soliciting employee representatives for the employee council. Accordingly, I find that by soliciting employees to form and join this employee council, and by posing notices to implement the selection of employee participants, Respondent violated Section 8(a)(1) of the Act.

With respect to Cepeda's allegations that Laurent and Steible solicited her to resign from the Union, I have reviewed the record and conclude that the accounts offered by Laurent and Steible are more credible. Essentially, I conclude that it was Cepeda who complained to both Laurent and Steible that she felt that she was in the middle between the Union and the Respondent.

In responding to Cepeda's complaints, I conclude that Laurent and Steible told her only about her option to leave the Union under the biannual terms set out in the contract. The record is not sufficient to support the General Counsel's contention that either Laurent's or Steible's remarks were coercive within the meaning of Section 8(a)(1) of the Act.

B. *Fountainview Place, Indianapolis, Indiana*

Statement of the Case

The complaint alleges with respect to the Fountainview facility[11] that Respondent violated Section 8(a)(l) of the Act

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[11] The Fountainview facility is a skilled care nursing facility located in Indianapolis, Indiana, with about 223 beds and a normal occupancy of about 210 beds. The parties stipulated that

by ordering an employee out of the facility for having acted as a union observer at a Board-conducted election earlier in the day and by threatening employees with unspecified reprisals for having selected United Food and Commercial Workers International Union, Local 917, AFL-CIO (the Union), as their representative. The complaint also alleges that Respondent violated Section 8(a)(3) and (4) of the Act by issuing written warnings to its employees, Lillie Davis and Kastle Gannon.

1. Facts

In 1988, the Union undertook an organizational effort at Fountainview that led to an election there on August 18, 1988. The Union won and was subsequently certified on August 26, 1988. On the day prior to the election, Roger Brown, a Beverly human resources representative, contacted union organizer, Steve Kidwell, to ascertain which employees the Union intended to designate as the union observers at the morning and afternoon polls, so that Fountainview could make arrangements to cover for them. Kidwell declined to divulge the identity of those two individuals except to say that it would be one NA on each of the two shifts during which the polling

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Beverly operated Fountainview as a leased facility from April 1982 until December 31, 1990, under a lease agreement from Health Quest Realty VII. On December 31, 1990, Delmar Limited Partnership, with the consent of Health Quest, assumed Beverly's lease. The "Assignment and Assumption of Lease with Consent of Lessor," dated December 31, 1990, also provides that despite the assignment, both Beverly and Delmar are jointly and severally obligated under the terms of Beverly's lease with Health Quest.

would take place. DON Patricia Nicolau[12] also testified that she was aware on August 17 that two NAs would be serving as union observers, but she did not know their identities.

In fact, Kidwell had previously contacted Gannon and Davis and they had agreed to be union observers. Both had been active union supporters in the Union's organizational effort, soliciting union authorization cards and attending union meetings.

Pursuant to Board policy, a preelection conference was scheduled for 5:45 a.m. on August 18 to review Board eligibility and pertinent election arrangements. It was at the preelection conference, or shortly thereafter at or about 6:15 a.m, that Davis arrived and was introduced to Brown as the union observer for the morning poll. Davis' normal work hours were 6 a.m. to 2 p.m.

Davis served as the union observer during the first poll and returned to work at or about 7:30 a.m. and worked until 2 p.m., when her regular shift ended, at which time she left the premises, returning for the count of ballots at the close of the afternoon polling session at 3:30 p.m.

The union observer for the afternoon poll was Gannon.[13] Gannon had not attended the morning preelection conference, and Brown was not advised that Gannon had been designated as the Union's observer until she went to the election site in the library for instructions at or about 2:15 p.m. When the afternoon poll ended at 3:30 p.m., the ballots were counted. After the count, Gannon returned to work about

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[12] At the time of the election Nicola's maiden name was Sanders.

[13] Gannon had served as a union observer in a prior election at this facility conducted in 1986.

4 p.m. Nothing was said to her at the time about her absence from work while serving as union observer.

Apparently, nothing was said to either Gannon or Davis on the day of the election about their absences from their shifts due to their participation in the election as union observers, but sometime on the following Monday, Mary Caughill, ADON, Nicolau, and Brent Waymire, administrator, met to discuss whether or not the absences of Gannon and Davis for the time spent as union observers violated company policy inasmuch as neither had notified management within 2 hours from the beginning of their shifts that they would be absent.[14] They agreed that these absences violated company policy and that disciplinary action should be taken.

On Tuesday, August 22, some 4 days after the election, both Davis and Gannon were called into Caughill's office and given written disciplinary action forms captioned, "Informal Counseling Session," which recite that they were being counseled for unexcused absences due to their failure to notify the director of nursing with their tardiness on August 18 during the polling hours. These forms were signed by Caughill and initialed as reviewed by Waymire. Davis refused to sign the form, protesting that she was unaware that she needed permission or needed to notify management in order to act as union observer. Gannon also refused to sign the

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[14] The "Attendance Control Program" in effect at the time sets out several "Examples" of "Types of Unexcused-Unauthorized Absences," one of which reads, "Failure to notify Department Head/Supervisor, Weekend Manager, House Supervisor or Nursing Scheduler of absence within two (2) hours prior to employee's normal scheduled shift."

form, complaining that both Waymire and Nicolau were aware that she was absent from her shift because she was acting as union observer.

Turning to the allegations of unlawful coercion, Davis testified that after the counting of the ballots on August 18, which disclosed that the Union had won the election, she was asked by Brown to leave the premises because she was not on the clock. This would appear to be accurate, since Davis' shift ran from 6 a.m. to 2 p.m., but she had returned to participate in the ballot count. In her testimony, Davis conceded that she could not recall any mention of the Union at this time. Brown testified that after the count, she was leaving the room out of the door that led to the hall into the nursing home, although there was a door that led directly outside. Brown testified that he was afraid of the disruptive effect on the patients if Davis went back into the facility and, in accordance with company policy, because she was not on worktime, asked her to exit the premises through the door that led directly outside.

Davis left, but returned to the premises shortly thereafter where she encountered Joyce Williams, a labor relations assistant to Brown, who told her that she would be sorry that they had elected a union. Davis asked why, and Williams responded, "Give them about a year and you'll find out why you will be sorry."[15]

2. Analysis and conclusions

First, let us examine the allegation that Respondent violated Section 8(a)(3) and (4) of the Act by its disciplinary

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[15] Respondent submitted an affidavit reflecting that a subpoena had been sent to Williams by the Respondent on January 24, 1992. Williams did not appear, however, and did not testify.

counseling of Davis and Gannon. The record discloses that both were active union supporters and that Gannon had acted as a union observer in a prior NLRB election in 1986. They were selected, as union observers normally are, because they were able and willing to represent the Unions' interests at the election site during the voting times.

Respondent contends that the disciplinary action was necessary to enforce written company policy against unexcused absences. Although, however, they may not have been aware of the individual identities of the two union observers, management was on notice, at least the day prior to the election, that there would be two union observers, one NA for each of the two polls. Respondent knew how long these observers would be absent from their shifts. With this information, Respondent could have covered for the observers as it saw fit, and the record discloses no probative evidence that their absence created staffing problems or adversely affected patient care.

Nor was this a situation when employees, without notice, voluntarily absent themselves from assigned work. Respondent knew that these employees were on the premises, where they were, and what they were doing.

Moreover, no effort was made to implement any disciplinary action, nor was any disciplinary taken, until the hierarchy gathered 3 days later to review the matter and concluded that discipline was appropriate.

With respect to Respondent's contention that Davis and Gannon were properly disciplined pursuant to Respondent's "Attendance Control Program," I note that the facts disclose that Davis and Gannon were tardy, not absent, during the polling times and that as noted above Respondent was aware of where they were and what they were doing. The "Examples'' with respect to lateness, provide discipline for

"Repeated occurrences of tardiness for work, clocking in after normal starting time or shift." Respondent's contention that written disciplinary action taken against Davis and Gannon was an appropriate response to a single lateness, in circumstances when that lateness was occasioned by their acting as union observers for an election, is simply not credible.[16]

In these circumstances, I conclude that the disciplinary action in issue was taken because Davis and Gannon were union supporters engaged in clearly protected activity as union observers, and that it was this activity that motivated Respondent to issue the disciplinary counseling. This constitutes discrimination against employees within the meaning of Section 8(a)(3) and (4) of the Act.

With respect to the 8(a)(1) allegations of interference, I am satisfied, based on this record, that Brown did not violate the Act simply by requesting Davis to exit the premises directly from the side door. Her shift was over and Respondent had legitimate interest in providing that off-duty employees not return to the premises when they are not on duty. The record discloses that the Union was not mentioned during this incident and does not otherwise support the conclusion that Brown ordered Davis to leave the premises because she had acted as a union observer, as alleged in the complaint.

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[16] With respect to the contention that Respondent's written discipline of Davis and Gannon also violates Sec. 8(a)(4) of the Act, it appears that the Board has held that discrimination under Sec. 8(a)(4) for having "filed charges or given testimony under this Act" includes discipline for other aspects of the representation process, including participation in the election process as a union observer. *Hyatt Regency Memphis,* 296 NLRB 259 fn. 4 (1989).

The threat of reprisal conveyed by Williams to Davis is unrebutted, however. Accordingly, I credit Davis' testimony in this regard, and I conclude that by threatening Davis with unspecified threats of reprisal on account of the Union having been selected to represent the Respondent's employees, Respondent violated Section 8(a)(1) of the Act.[17]

C. Liberty House Nursing Home, Clifton Forge, Virginia

Statement of the Case

The complaint issued on charges filed by Peggy M. Urban, an individual (Urban or the Charging Party), alleging that Respondent, at the Liberty House facility, discharged Urban for having engaged in union activity in violation of Section 8(a)(3) of the Act. The hearing thereon was conducted before the administrative law judge on February 19, 1992.

Findings of Fact 1.

The alleged unfair labor practices

a. *Facts*

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[17] Regarding this allegation, Respondent contends that the General Counsel's delay in issuing the complaint was the direct cause of Respondent's inability to locate former employee Joyce Williams to refute Davis' testimony and that therefore this allegation should be dismissed. There is no probative evidence, however, to support this contention in the record and Respondent's motion to dismiss is denied.

Liberty House is one of Respondent's nursing home facilities located at Clifton Forge, Virginia. At the time of the alleged unfair labor practices, James Daugherty was regional manager, supervising some 10-15 nursing homes, including Liberty House.[18] Mae Tucker was the administrator at Liberty House, and Henry Agee was the in-service director.

By way of relevant background, it appears that the United Paperworkers International Union (the Union) began an organizational effort at Liberty House with the filing of a petition for election in 1984. The Union won and was subsequently certified on February 4, 1985, for a unit of full-time and regular part-time nursing assistants, cooks, maintenance employees, ward clerks, and housekeeping employees at the facility. Subsequently, apparently without ever having reached agreement on a collective-bargaining agreement, the Respondent filed a decertification petition on December 8, 1986, and withdrew recognition from the Union by notice dated January 2, 1987. A charge was filed by the Union protesting that withdrawal of recognition, but that charge was dismissed on October 28, 1987. That dismissal was sustained on appeal December 17, 1987.

After the certification in 1985, the Union made an effort to negotiate a contract with Respondent. Urban was one of five unit employees on the negotiating committee. Urban testified that she was active in the negotiating sessions held between August 1985 and January 1987 when the Respondent

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[18] Par. 1 of the complaint was amended at the hearing to reflect the following corrections in names and titles:

Neil Bateman--regional manager
James Daugherty--regional manager
Henry Agee--in-service director

withdrew recognition of the Union as the collective-bargaining representative of the unit employees.[19]

The incident alleged to have culminated in the unlawful discharge of Urban, a CNA, occurred about 11:30 p.m. on

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[19] The Respondent's position toward the organization of its employees is set out in its employee handbook in which it states:

> STATEMENT ON UNIONS
>
> Your management firmly believes that any union organization is unnecessary and undesirable in our health care industry. Our business is caring for people and providing the best care possible for our residents. We know our business better than anyone else, and management will do everything possible to show you that such representation is not necessary. Your management believes that the best possible working relationship exists where there is no interference by a third party. We do not want unions in our facilities, but the company respects your right to make that choice.
>
> Management at your facility is committed to deal on a personal, direct basis with you in providing a friendly place for you to work.
>
> You are strongly encouraged to discuss openly and frankly, any problem or concern that may arise during the course of your employment. By working together as a team and keeping lines of communication open, the company believes it can do more for you than any labor union can . . . your company can do it more quickly, more effectively, more permanently, and without you incurring the additional expenses of initiation fees, monthly dues, possible fines, and special assessments.

the night of July 18, 1988.[20] Joy Jackson, a newly hired RN,[21] was finishing her shift. She testified that she heard loud and angry voices coming from one of the patients' room. As she approached the doorway, she heard voices cursing and complaining about work left to be done. She testified that she arrived in time to see one of the CNAs hit Hattie Houston, a patient in that room, on the shoulder. Jackson had been employed only a couple of weeks and could not identify either of the two aides in the room. They were later identified, however, as Peggy Urban and Lois Nicely. Jackson identified Urban as the one who hit Houston. According to Jackson, she was disturbed by the incident and, on July 19, reported to Henry Agee, in-service director, what she had seen and heard.

Agee confirmed that Jackson came to his office on July 19 to report the incident. Thereupon, Agee reported the matter to his superior, Administrator Mae Tucker. Tucker advised him to have Jackson submit her version in writing. Agee then visited Houston and examined the shoulder area where she had allegedly been hit. Agee testified that he saw no evidence of physical abuse and that Houston was unable to confirm to him that she had been slapped. Agee testified that Houston suffered from senile dementia and was unable to comprehend, recall, or communicate much of the time and was also generally disoriented. Agee also asked Jackson to write up her account of the incident so that it could be investigated. A memo dated July 20, 1988, signed by Jackson, reads:

> On 7-18-88, I had worked 3-11 & was getting ready to clock out when I heard loud voices around the corner. "There were 4 aides

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[20] All dates refer to 1988 unless otherwise indicated.

[21] Jackson was hired about 2 weeks earlier.

on 3-11 & only 2 of us here on 11-7 & we have to come in here & clean up your stinking shit. There's no sense in it," etc.

"Now Hattie, don't you start that damn pinching already, I mean it."

I walked around the comer just in time to see Peggy Urban strike Hattie Houston. 1 backed away from the door to see what would happen next. Evidently, the 2 aides became aware of my presence because I said, "Who was that?" & the other replied, "That was the new nurse."

The conversation then turned to, "Hattie, you know you need to get cleaned up now, come on & let us wash you up so you won't be so sore."--The other aide was Lois Nicely.

After learning of the incident from Agee on July 19, Tucker made a telephone call to Regional Manager James Daugherty and described the incident to him and recommended that Urban be discharged. Daugherty advised her to get statements from the witnesses. According to Daugherty, because Urban had been employed for over 5 years, it was necessary, as a matter of company policy, to contact Regional Vice President for Operations McLawhon prior to disciplinary action. This was done. McLawhon recommended suspension pending an investigation. Daugherty told Tucker to get back to him after she had obtained statements from the witnesses. She did so, and after a discussion with McLawhon, who also recommended dismissal, action was taken to terminate Urban.

Urban, who had worked a full day on July 19, was advised by Tucker, by telephone on July 20 that she was being charged with patient abuse and not to report to work until the matter was resolved. Urban denied any abuse.

Urban testified, with respect to the incident itself, that on July 19 she was employed on the 11 p.m. to 7 a.m. shift, working with Nicely. They went into the room occupied by Houston and another patient. On observing that Houston was wet and dirty, they went about changing her. Urban and Nicely testified that Houston complained that she was not wet and began hollering because she did not want to be disturbed. While they were so engaged, a registered nurse appeared at the door and Nicely asked, "Who is that?" and Urban responded that she thought it was a new nurse. Neither knew who she was. They finished cleaning Houston and went on to finish their rounds.

On July 20, after Jackson had given Agee her statement, they both went to see Tucker. Jackson gave an oral account of the incident. Tucker also testified that on July 20, she also tried to discuss the incident with Houston but Houston's mental condition precluded any meaningful inquiry. Tucker also called Nicely who told her that there had been no slapping or cursing, but agreed to provide Tucker with a statement about the incident. A signed note dated and submitted to Tucker on July 21 from Nicely reads:

> I was in the room at the time Peggy [Urban] was talking to Hattie Houston. Her voice was raised, but I cannot say the exact words is [sic] was saying.

Nicely also testified that she did not see or hear any patient abuse.

On July 21, Tucker again called Urban, this time to advise her that the investigation was continuing and that she was not to come back to Liberty House until she was contacted by Tucker on the following day, July 22.

On July 22 Tucker called Urban and asked her to come to her office. When Urban arrived at Liberty House she went to Tucker's office. Agee was also present. Urban again protested her innocence, saying that she had not hit Houston, and that Nicely would support her. Urban also became irritated with the accusation and demanded to confront Jackson. She was accommodated, and when Jackson arrived, she told Urban that she had seen her hit Houston on the shoulder and that she had no reason to say so if it were not true. Urban again denied any abuse of Houston. Jackson departed, and Tucker gave Urban a written notice of dismissal alluding to the written statements of Jackson and Nicely and noting, "As per personnel policy automatic termination. Discussed and approved by Regional Supervisor Mr. Daugherty." In the portion reserved for employee comment, Urban wrote "I didn't strike Hattie or curse her. I've never abused any one of my patients in 8 years I've been here. Hattie and I are very close."

Urban also asked to see the statements alluded to in the dismissal notice, but Tucker declined, telling her that she would need a subpoena to see them.

The record discloses that right up until the time of this incident, Urban had been a highly regarded employee. Her work performance evaluations throughout the 8 years of her employment attest to this. For example, in a performance evaluation dated April 14, 1988, Urban's overall evaluation was "Very Good." In the comment portion appears, "Peggy has insight into patients' needs and works very hard at providing a warm loving atmosphere for her patients to live

in. At holiday time goes out of her way to make happy memories."

By way of background, it appears that Houston was in pain much of the time and often disoriented. Urban had been attentive to her needs on a daily basis for about 4 years and testified that over the years she and Houston had developed a special bond. They would discuss personal family matters, and Urban would bring little gifts for her, and arrange parties for her on special occasions, such as her birthdays. Houston referred to Urban as "Mom." The caring and affectionate nature of their relationship was corroborated by Cleopatra Williams, Houston's first cousin, who paid visits to Houston three or four times a week and who testified that Houston loved and depended on Urban and that Urban showed special care and kindness to Houston. Nicely confirmed the long-term affectionate relationship between Houston and Urban.

b. *Analysis and conclusions*

A review of the record discloses that Jackson, a short-time employee, testified that she observed an incident involving persons unknown to her, and that she saw one of those persons "strike" Houston. Instead of confronting the abuser or notifying responsible authority at the facility at that time, however, Jackson withdrew, pondered the event, and reported it the following day to Agee.

The investigation was cursory. Urban vigorously denied the charge. Nicely submitted a statement, but this statement did not support the patient abuse allegation and at the hearing, Nicely testified that she never saw any patient abuse. Houston, albeit she was generally disoriented, did not support the allegation when she was asked about it, and she showed no signs of any physical abuse. Williams, a cousin

and frequent visitor, confirmed that Urban had always been especially loving and kind in her relationship with Houston. The record, particularly the testimony of Urban, Nicely, and Williams, makes it clear that Urban was loving and kind to Houston beyond any normal patient relationship. In short, based on the unsupported, uncorroborated observations of one employee, Urban was discharged.

Respondent also argues that the General Counsel has not met its burden of showing that Urban's discharge was motivated by antiunion considerations, particularly as Urban's last union activity occurred some 18 months prior to her discharge while she was acting as a union negotiator. Obviously, after Respondent lawfully withdrew recognition from the Union in January 1987, Urban was no longer able to function as the union negotiator. Nonetheless, her prounion views and posture were known to the Respondent, and the possibility of renewed organizational efforts always exists. Given the Respondent's expressed antiunion attitude, it is my opinion that the Respondent simply embraced the opportunity to rid itself of an active union adherent.

In summary, the evidence discloses that Urban was a long-time competent employee, with an especially kind and loving relationship with Houston. She was also an active union supporter and Respondent was aware of her union sympathies and adherence because she was engaged in a high-profile position of contract negotiator. Based on a cursory investigation, which did not support the allegation, Urban was discharged. In my opinion, Urban was discharged as an act of retaliation on the part of Respondent against Urban motivated by Respondent's desire to rid itself of an active union supporter.

D. Mount Lebanon Manor Convalescent Care Center Facility, Mount Lebanon, Pennsylvania

Statement of the Case

On charges filed by District 1199P, National Union of Hospital and Health Care Employees, SEIU, AFL42IO (the Union or the Charging Party), the complaint alleges that Respondent violated Section 8(a)(l) of the Act by threatening employees with the filing of legal proceedings because of their grievance filing activity on behalf of the Union. Further, the complaint alleges that Respondent violated Section 8(a)(5) of the Act: by refusing to furnish certain information to the Union relevant and necessary for the Union to perform its function as the exclusive collective-bargaining representative of unit employees; by announcing and implementing a scheduling change that resulted in a reduction in the hours of unit employees without notice to or bargaining with the Union; and by failing to comply with contract provisions providing for grievance processing and union membership information.

1. Facts

a. *Implementation of master schedule and failure to provide requested information*

On September 16, 1988, the Union was elected to represent a unit of service and maintenance employees at the Mount Lebanon facility. On October 21, 1988, the Union was elected to represent a unit of LPNs at the facility. Subsequently, collective-bargaining agreements for both units were negotiated effective January 18, 1989, until December

1, 1989.[22] Subsequent contracts were negotiated for the period December 1, 1989, through November 30, 1992.

A meeting was conducted at the facility on April 25, 1989, to discuss labor management concerns. In attendance were Timothy Cimbalnik, administrator, and Elaine Walley, DON, representing management. Robert Moore, union organizer, and three shift delegates--Tracy Thomas (7 a.m. to 3 p.m. shift), Liz Miller (3 to 11 p.m. shift), and Mary Morgan (11 p.m. to 7 a.m. shift)-represented the Union. Insofar as the record discloses, it was at this meeting for the first time that Cimbalnik and Walley advised the Union of their intention to implement a "master schedule" to solve its staffing problems on weekends. The LPN contract guarantees LPNs every other weekend off, and it appears that the facility had been experiencing problems both in obtaining part-time staff to work weekends and with those scheduled for weekends calling off. It appears that implementation of the master schedule would result in a reduction of hours for many full-time LPNs while providing additional hours for part-time employees. The union representatives made it clear that they did not agree to the master schedule change. Moore requested copies of absenteeism records and projected vacation schedules so as to better evaluate the master schedule issue. Cimbalnik provided none of the requested information at this meeting.

On the following day, April 26, Moore wrote to Cimbalnik expressing dissatisfaction with the proposed master schedule, requesting that it not be implemented, and requesting certain information for discussion purposes. The letter read:

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[22] All dates refer to 1989 unless otherwise indicated.

In our Labor/Management meeting of 4-25-89, we discussed your proposed changes in staff scheduling. As we discussed your proposal, some of our questions were answered and some were not. You and your representative informed the bargain-unit representatives and myself that your proposal would result in a substantial loss of hours and income for an untold number of the bargaining unit employees. While we realize staff shortages does present a problem at Mount Lebanon Manor, we are unclear as to how a reduction in hours worked by certain staff members will correct the problem.

The bargaining unit employees have indicated they are very discouraged and troubled by your scheduling proposal. This fact, coupled with those mentioned above, forces us to exercise the option offered by your representative ie to develop an alternative schedule. We believe this option is within our contractual and/or legal rights as well.

We are currently forming a committee to study the staff problems and to recommend a more satisfying solution. As stated in the current labor agreement, we invite you to appoint your representatives to the committee. Your full cooperation, as well as ours, will be necessary for this committee to succeed.

We believe the problem must be addressed in a timely manner. As they say, "Time is money." Therefore, we formally request the following information.

1. *Current staffing schedules/patterns*
2. Shifts and/or times when increased staff to patient ratios are necessary
3. Absenteeism records
4. Projected staff shortages caused by vacations, holidays, etc.
5. Projected in-service requirements

We believe harmony in the workplace benefits labor, management and patients alike. Your scheduling proposal, as it stands, would have such an adverse effect on who knows how many employees, that it would be detrimental to employee moral and workplace harmony. Therefore, we request you do not implement your proposal and at least serious consider the findings and recommendations of the committee.

We suggest we meet soon, form the committee and get them started on their task. Please contact me at your earliest possible convenience.

By letter dated June 1, Thomas sent to Cimbalnik a letter designating individual committee members who would be serving on the six committees provided for in a letter of understanding to the existing contract. The pertinent paragraph relating to scheduling reads:

> The SCHEDULED-NURSING ASSISTANTS COMMITTEE complies with the LETTER OF UNDERSTANDING of the UNION CONTRACT, ITEM 1. Please include them in developing scheduling alternatives that meet

> the staffing requirements to maximize the number of weekends-off for Nursing Assistants.

Cimbalnik did not respond to this letter, and no meetings were held with the Union's committee.

On July 5, John Engelhardt, who had replaced Moore as the union organizer servicing the contracts, along with Miller, Thomas, and other employees, met with Cimbalnik and Walley in Cimbalnik's office. The Union expressed its concern that the master schedule would reduce the pay of several full-time employees by reducing the number of days they worked. At this meeting, Walley complained about the staffing problems on weekends. Engelhardt requested information that he told Cimbalnik was necessary for him to evaluate the Respondent's master schedule. In addition to the information previously requested by Moore, Engelhardt asked for staffing and call-off information for the preceding year, and State Department of Health reviews identifying deficiencies at the facility. Cimbalnik declined to provide any information and responded that some of the information was available from other sources, some was privileged to management, and that information concerning State Department of Health reviews were not necessary in order to discuss the scheduling changes.

On July 6, sometime during the 3 to 11 p.m. shift, a new master schedule was posted. It is undisputed that this new schedule reduced from 10 days to 9 or 8 the number of days per 2-week pay period worked by several unit employees, both in the LPN unit and the service and maintenance unit.

On the next day, July 7, the Union filed a grievance signed by 53 employees protesting the implementation of the master schedule, and, by letter dated July 10, the Union

advised Cimbalnik that it would engage in informational picketing on July 20.

On July 17 a meeting was held on the master schedule grievance. At this meeting, Engelhardt handed a letter to Cimbalnik stating:

> I am writing to formally request information vital to bargaining and grievance action on the issues of absenteeism, weekend scheduling, sick leave policy, and the recent layoff. This information is necessary if the Union is to carry out it's [sic] duty to fairly represent the membership on these matters.
>
> Please forward the following items as soon as possible:
>
> 1. A full set of pre and post layoff schedules for the full bargaining unit.
>
> 2. Data reflecting the number of call-offs during the last year. Please provide the date in such a way as to enable breakdowns by day of the week, department, and shift. Please also include data, broken down in the same way, that indicates how many of the days lost to call-offs were paid days.
>
> 3. A full and complete breakdown of all time lost, paid or otherwise, through injuries on the job. Please also include the reason or cause of such lost time. The data should cover the last two years.
>
> 4. Copies of the last three cost reports the home submitted to the State.

> 5. Copies of all material concerning the last three inspections by the State Health Department, including plans of correction.
>
> 6. The home's current budget and the last two previous budgets.
>
> 7. A copy of the daily calculation of minimum staff levels for the last 6 months.
>
> I thank you for your cooperation. If you have any questions concerning this letter, do not hesitate to contact me through our State College office.

Engelhardt testified that the information sought was necessary in order to evaluate the issue of understaffing that gave rise to the implementation of the master schedule over which the grievance was filed.

The information was not provided except for item 1 of the July 17 letter. The record discloses that in September 1989, however, the grievance was settled when the Respondent rescinded the master schedule and paid backpay to those employees who lost wages by the reduction in hours.[23]

b. *Failure to comply with contract about grievances and membership information*

With respect to the matter of Cimbalnik's failure to comply with contract provisions regarding the processing of

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[23] This settlement of the grievance between Respondent and the Union does not, however, contrary to the assertions of Respondent, moot the unfair labor practices allegations of the complaint.

grievances, it appears that the applicable contracts provide, with respect to written grievances not settled at step 1, that they be submitted to the administrator at step 2 and that "The parties will meet to discuss the grievances unless mutually agreed otherwise. The meetings will be held expeditiously and the Administrator will report in writing to the employee(s) and the Union within ten (10) work days after receipt of the grievance." Miller testified that Cimbalnik, rather than meet with the Union, would only respond to the Union in writing. Miller also testified, however, that on those occasions, when she requested Cimbalnik to meet on grievances, he did so, notably with Miller, Engelhardt, and others on July 17 on the master schedule grievance. Thomas testified that sometimes Cimbalnik met with her on grievances and sometimes he did not, but that he never refused to meet on a grievance. Cimbalnik testified that he responded to every grievance and that whenever a meeting at step 2 was requested, he never refused to meet.

Regarding the failure to provide membership information, it appears that by letter dated July 6, Engelhardt wrote to Cimbalnik, calling his attention to section 5 of the contracts requiring the Respondent to provide the Union with the names, home addresses, classifications, and dates of hire of all new employees on a monthly basis, as well as a monthly report by names and dates of terminated employees and monthly updates of employee address changes. In the letter, Engelhardt also requested those reports for the months of February through July 1989 and asked that they be submitted monthly in the future. In response, Cimbalnik furnished only one report. Subsequent reports were not furnished on a regular basis until the spring of 1990.

c. *The 8(a)(1) threats of legal proceedings*

On July 24 Walley called Miller to her office. Walley began the conversation by saying that although she liked and respected Miller, as did the patients and fellow employees, she was concerned about certain letters that had been circulated. This was an apparent reference to complaint letters that had been sent to the State of Pennsylvania Department of Health requesting investigations of patient care; specifically, the number of in-house decubitus, shortages of lift pads for transferring patients, understaffing, and excessively early wake up of patients. Pamphlets distributed to patients' family members during the picketing on July 20 also complained that patient care was being compromised by under-staffing and accused Beverly Enterprises of caring more about profits than patients, and urging family members to call on various public officials and agencies to investigate.

Walley went on to tell Miller that if anything in those letters or pamphlets jeopardized her license she would pursue it legally. According to Miller, "[S]he was warning me that if her good name was used, she would sue for libel."

On July 27 Thomas went to Cimbalnik's office to present him with a grievance. The grievance read: "Violation of contract including Article 6 and Article 7. Willful miscalculation and deduction of Union dues. Management is intentionally overdeducting full-timers due and underdeducting part-time dues." After reviewing the grievance, Cimbalnik expressed his concern about the allegations being "willful" and "intentional." Thomas, whose testimony I credit in this regard, testified that Cimbalnik told her that she had better be able to prove those assertions or he would be able to sue Thomas for libel. In view of Cimbalnik's objections, Thomas took back the grievance and added the words "in our opinion" to the offending sections and resubmitted the grievance.

On August 10 Miller, along with another employee, Donna Rogers, went to the Cimbalnik's office to present him with a grievance. A number of grievances were being filed at that time, and Cimbalnik complained, in essence, that they were being filed to harass management. Miller denied that this was the case. Cimbalnik went on to say that he was building a case of harassment against the Union.

2. Discussion and analysis

a. *Implementation of the master schedule and failure to provide requested information*

The record discloses that Respondent, over the Union's protest, implemented a master schedule that had the effect of reducing the hours of unit employees. Although Respondent argues that it was agreeable to accepting input from the Union on the master schedule, the record is totally insufficient to support the conclusion that Respondent has discharged its statutory duty under Section 8(a)(5) to bargain with the Union.

The Respondent's basic contention is that the contract's management rights provisions constitute a waiver of any bargaining obligation it might otherwise have had to the Union. Specifically, Respondent argues that it had the fight, as provided in article 8, section 1 of the contract, to "direct, control and schedule its operations and work force..."

As a matter of Board and court law, any waiver of the Union's right to bargain over changes in wages, hours, and terms and conditions of employment must be clear and unequivocal. *South Florida Hotel Assn.*, 245 NLRB 561, 567 (1979), enfd. in pertinent part 751 F.2d 1577 (11th Cir. 1985). The record discloses no such waiver.

This record makes it clear that the scheduling change had the direct, necessary, and immediate result of reducing the work hours of unit employees and thus became a mandatory subject of bargaining. The Employer was not free to unilaterally implement such changes without first negotiating the matter with the Union.

Although it could be argued that the Union has waived its right to bargain over any scheduling of the work force that did not affect wages, I am not satisfied that the provisions of article 8 are sufficient to constitute a clear and equivocal waiver when the changes in scheduling have the direct impact on the unit of reducing their wages.

With respect to the refusal to furnish information, Respondent argues that as it had no duty to bargain over the master schedule, it had no obligation to bargain over the Union's request for information related to the master schedule. As I have concluded that a bargaining obligation did exist, this argument must fail. Respondent also contends, however, arguendo, that it did satisfy its duty to provide information to the Union. I do not agree.

Letters were sent to the Union on April 26 requesting certain information. There was never any written response providing the information requested. The same is true concerning the Union's request for information by letter dated July 17. Respondent contends that some of the requested information was privileged, some of it not available in the form requested, some of it already furnished, and some was available to the Union from other sources. In my opinion, the information being sought was relevant and necessary to the Union in the performance of its duty as collective-bargaining representative of unit employees both in evaluating the master schedule proposal and in processing the subsequent grievance. Indeed, much of what was sought must have been reviewed by

Respondent in determining their staffing needs so as to formulate the master schedule.

In short, Respondent had a duty to provide whatever information the Union requested that was relevant and necessary for the Union to discharge its bargaining obligation to unit employees. The information sought by the Union was such information and, to the extent that Respondent failed to provide such information, it violated its bargaining obligations under Section 8(a)(5) of the Act.[24]

b. *Failure to comply with contractual grievance and union membership provisions*

The record discloses that after grievances were filed at step 2, Cimbalnik would often respond in writing to the grievance. As set out above, the contract appears to contemplate a meeting to discuss the grievance unless mutually agreed otherwise. The record also discloses, however, that while Cimbalnik did not call for step 2 meetings, he did not refuse to participate in such meetings whenever requested to do so by union officials. But the contract is silent on who, if anyone, has the obligation to call for a meeting. To conclude that Cimbalnik violated the Act, in circumstances whether neither party was obligated under the contract to call for a meeting and where Cimbalnik

[24] The record indicates that certain staffing schedules may have been provided to calculate backpay when the parties resolved this matter in September 1989 and that other information sought by the Union was disclosed in documents subpoenaed by the Union and the General Counsel. Even if this were true, this would affect only the remedy and would not justify a dismissal of the allegations.

participated in those meetings requested by the Union, is not warranted.

Regarding the membership information, it is undisputed that the contract required the Employer to provide the membership information set out in article 7, paragraph 5 of both the LPN and service and maintenance employee unit contracts. The record fully supports the conclusion that a request for the information was made to Cimbalnik, that except for a 1-month period it was not provided, and that the contractually mandated information was not provided until the spring of 1990. In these circumstances, I conclude that Respondent violated Section 8(a)(5) of the Act by failing to furnish the information.

c. *Threats of legal proceedings*

The complaint alleges that on July 17 and August 10 Cimbalnik threatened Thomas and Miller, respectively, and that on July 24 Walley threatened Miller with legal proceedings because of their grievance filing activities.

With respect to the Walley incident on July 24, it appears that Walley, out of concern for her reputation, advised Miller that/f the letters threatened her license, she would take legal action. In my opinion, given the nature of the letters involved, particularly those distributed to patients' families during the picketing, Miller was expressing a legitimate concern for her professional reputation and status. Such a statement does not constitute a threat to Miller for filing any legitimate grievances.

Concerning the July 27 conversation, Cimbalnik was handed a grievance by Thomas, which, in essence, accused Cimbalnik of willfully miscalculating and deducting union dues and intentionally overdeducting for full timers and

underdeducting for part-timers. Cimbalnik responded by objecting to these characterizations and remarked that if the accusations were not proved, he could sue for libel, and the grievances themselves would be proof. Thomas then decided to change the grievances and refile them, adding the words "in our opinion." In my opinion, Cimbalnik's reaction was simply an expression of concern that his integrity was being impugned and observing to Thomas that the grievance itself would show that. There was no evidence that Cimbalnik made any effort to discourage Thomas from filing these or any other grievances and thus no violation of Section 8(a)(l).

Turning to the August 10 incident, as set out above in greater detail, Cimbalnik, on being presented with two grievances, expressed his view that management was being harassed with the filing of grievances and that he was building a case of harassment against the Union. In my opinion, this allusion by Cimbalnik to building a case of harassment is insufficient as a matter of evidence, and does not rise to the level of establishing the allegation set out in the complaint that Cimbalnik threatened legal action because of the filing of grievances.

E. Danbury Pavilion Health Care Facility, Danbury, Connecticut

Statement of the Case

The complaint, based on charges filed by New England Health Employees Union, District I I99/S.E.I.U., AFL-CIO (the Union or the Charging Party), alleges that Respondent, at its Danbury Pavilion Health Care facility, violated Section 8(a)(5) of the Act by unilaterally, without notice to or consultation with the Union, ceasing to pay "short

pay" to licensed practical nurses from February 2 to March 2, 1989. A hearing on this allegation was conducted before the administrative law judge on March 4, 1992, in Hartford, Connecticut.

1. The alleged unfair labor practices

a. *Facts*

The parties stipulated that at all times relevant, prior to November 1, 1990, Respondent leased and operated the Danbury Pavilion Health Care facility at Danbury, Connecticut.

It was further stipulated that on October 28, 1988, the Union was certified by the Board to represent a unit of the full-time and regular part-time licensed practical nurses and registered nurses at Danbury and that negotiations begun in November 1988 led to a contract effective March 21, 1989, which was followed by another contract effective November 1, 1989,[25] until October 21, 1992.

Respondent's facility consisted of five wings on two floors. These were designated as wings A and B on the first floor and wings C, D, and E on the second floor. Wing E consisted of four rooms of wing C and four rooms of wing D. Wing B was the medicare wing and because of federally mandated medicare regulations, it was necessary to staff the B wing with two nurses on each shift. With respect to scheduling, it appears on the 7 a.m. to 3 p.m. shift, here in issue, that normally, except for the B wing, one nurse was assigned to each of wings A, C, D, and E.

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[25] All dates refer to 1989 unless otherwise indicated.

It is undisputed that there was in effect, at all times relevant, a written company policy. With respect to the 7 a.m. to 3 p.m. shift, it reads:

> SHORT STAFFED
>
> THERE WILL BE SIX NURSES COVERING FOUR UNITS DURING THE WEEKDAYS. IF, DUE TO ABSENTEEISM, THERE ARE ONLY F1VE, THE NURSES WHO WORK THE UNIT FOR THE ABSENTEE NURSE WILL RECEIVE T1ME AND ONE HALF FOR THAT SHIFT. THIS APPLIES TO THE 7 TO 3 SHIFT.

The record discloses that it had been Respondent's policy, long prior to the advent of the Union, to compensate nurses, both RNs and LPNs, with "short pay" whenever absenteeism reduced their numbers from six to five on the "day" or 7 a.m. to 3 p.m. shift. For example, Gail Palumbo, a LPN on the day shift, testified that whenever it was necessary because one of the two nurses required on the B wing was absent and a nurse was reassigned to the B wing from another wing, those nurses left to do the additional work, would receive time and one-half for the hours they were so engaged. There were many ways in which absenteeism could reduce the number of nurses from six to five, but it appears that whenever this happened, those nurses doing the additional work were paid at time and one-half for those hours.

On or about February 2 Respondent reduced the hours of the E wing nurse on the day shift. Instead of a full shift, a nurse was employed from either 8 until noon or I p.m., with

the remainder of the day-shift hours on E wing being covered by other day-shift nurses on other wings. It is undisputed that this reduction in hours lasted until about early March and that during this period of time short pay was not paid.

On February 15 it appears that one of the day-shift LPNs called Barbara Stoltman, union representative, and complained to her that she had not been paid the short pay to which she was entitled. Stoltman contacted John Dettl, Respondent's labor relations negotiator, on or about February 28 and told him that Respondent was not entitled to make such unilateral changes in the wages of employees without discussing it with the Union and that she intended to file an unfair labor practice charge over it. Dettl said that he was unaware of any "short pay" policy at Danbury and suggested that they discuss it during negotiations for a first contract that were then in process.

Later in February, two other LPNs complained about not being paid short pay and timecards in evidence show that they were denied short pay for various periods during the timeframe of February 2 to March 9.

Mary Ferraro, the Administrator at Danbury testified that she had assumed the administrator position on January 19 and that she was unaware of any short pay policy until the matter was raised by the Union. She testified, however, that it was her position that the short pay policy did not apply for periods of less than an entire shift. Ferraro also testified that she did not know why these individuals were not paid short pay; that she was not involved in that decision; and that the decision had been made by a payroll clerk, unbeknownst to Ferraro. That individual did not appear to testify, however, nor did anyone else employed by the facility testify about the short pay policy or its application.

Wayne Chapman, who was then vice president for human resources for the eastern division of Beverly succeeded Dettl in early March and was primarily responsible for negotiating the March 21 contract. Chapman testified that he was unaware of the short pay policy at Danbury until March 1989. Further, that he regarded the matter as a simple reallocation of hours that Respondent was entitled to put into effect without consulting the Union and that did not trigger the payment of short pay.

The matter was resolved in early March when short pay was resumed and a provision was inserted into the contract providing "Weekday bargaining unit employees shall receive time and one-half for working short."

b. *Discussion and analysis*

Respondent argues that it was not obliged to bargain with the Union because it had not changed the circumstances under which short pay was paid. Respondent argues that the policy applied only when a day-shift nurse worked shorthanded for an entire shift because of absenteeism, which Respondent defines as the physical absence of a nurse from the facility. Neither of the Respondent's two witnesses were even aware of the policy, however, until this incident was called to their attention, and neither offered evidence to substantiate this position. Moreover, the entire record supports the conclusion that short pay was paid for less than an entire shift and that it was paid in circumstances other than absenteeism caused by the failure of scheduled nurses to report to work.

Respondent also argues that it was not required to bargain the issue because it was a simple scheduling change and that it was a prerogative of management to make such

changes without bargaining with the Union. Even though a scheduling change reducing hours on the E wing on the day shift may have triggered the short pay policy, however, this does not relieve the Respondent of its obligation under Section 8(a)(5) of the Act to discuss the matter with the Union when, as here, the record discloses payment of short pay whenever nurses covered the E wing in the absence of a nurse on that wing.

In short, Respondent, prior to the advent of the Union, had in place a written policy concerning "short pay" on the 7 a.m. to 3 p.m. shift, as set out above. This policy had been followed in the past and had been interpreted so that nurses on the 7 a.m. to 3 p.m. shift were paid at time and one-half for the hours they worked shorthanded, even if it were less than an entire shift, and specifically it was paid whenever the absence of a nurse on E wing required coverage by other nurses.

It is equally clear that there was a departure from this policy in February and March 1989. The timecards in evidence make it clear that the overtime requested for the licensed practical nurses was rejected.

It is not disputed that the Union was not notified or consulted concerning this matter. As the record discloses that short pay was paid in these circumstances in the past, clearly, the unilateral discontinuance of this wage policy, without notice or consultation with the Union, constitutes a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

F. *West Haven Nursing Facility, West Haven, Connecticut*

Statement of the Case

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish, on request by New England Health Care Employees Union, District 1199/S.E.I.U., AFL-CIO (the Union or the Charging Party), certain information necessary and relevant to the Union's performance of its function as the collective-bargaining representative of unit employees represented by the Union under contract.[26]

1. Facts

At the time Respondent purchased the West Haven Nursing facility in 1987 the Union represented under contract a unit of full-time and regular part-time LPNs and non-supervisory RNs at the facility. That contract was effective November 2, 1986, through November 1, 1989, which covers the time period relevant herein. Among those excluded from the unit were part-time employees who work less than 8 hours per week, temporary employees, and supervisors as defined in the Act.

Respondent purchased the West Haven facility January 1, 1987, and agreed, in writing, to assume the terms and conditions of the collective-bargaining agreement then in effect. That contract contained a union-security provision requiring unit employees to become union members within 30 days of their employment, and a checkoff provision providing for remitting dues to the Union.

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[26] At the hearing Respondent amended its answer to admit the supervisory allegations of the complaint.

It appears, however, that despite these provisions, as of January 1989,[27] there was only I LPN of a total of about 26 LPNs and RNs at the facility for whom dues were being checked off. The Union contends that about 5 or 6 LPNs and about 15 RNs were not supervisors and belonged in the contract unit. It further appears that the problem had been caused by Respondent hiring nurses from employment agencies as "independent contractors" and classifying them as nonunit employees, not subject to the union-security or dues-checkoff provisions therein.

On March 14, 1989, Barbara Stoltman, union organizer, by letter to West Haven Administrator Pam Miller protested the hiring of RNs and LPNs without affording them contact coverage and asked for a meeting.

On May 15, by a letter agreement from Wayne Chapman, supervisor human resources, to Stoltman, it was agreed to include the "independent contractor" nurses in the contract unit. The letter agreement states in this regard, "The Company agrees that they will become covered by the Union agreement provided they qualify based upon hours worked and their job classifications is part of the bargaining unit."

The matter was not resolved, however, because Respondent continued at various meetings in May to deny contract coverage to the "independent contractors" primarily RNs, on the grounds either that they did not work a sufficient number of hours to qualify as "full-time" or "regular part-time" unit employees, or they were supervisors excluded by job classification. It was Respondent's position that all of the RNs were supervisors so that none were unit employees covered by the contract.

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[27] All dates refer to 1989 unless otherwise indicated

On or about June 1, Mary Ann Allen, the union organizer who succeeded Stoltman, and Roxanne Maynard, a union delegate at facility,[28] attended a meeting with Miller. Maynard gave Miller a list of all the RNs and LPNs the Union regarded as unit employees. Maynard also requested a list of all of the regularly scheduled LPNs and RNs, their addresses, and rates of pay currently employed at West Haven. That information was not forthcoming, and on June 8, Allen wrote as follows:

> Our Union delegate, Roxanne Maynard, personally met with you on June 1, 1989 requesting a list of names, addresses and rates of pay for all current, regularly scheduled R.N.'s and L.P.N.'s who work at West Haven Nursing Facility.
>
> To date you have failed to make this information available to the Union. Yourself and Sue Briggs, as well as other management personal [sic], have been informing R.N.'s and L.P.N's that they do not have to join the Union. This is a direct violation of our Contract Article 1 Recognition, and also basis for unfair labor charges.
>
> All R.N.'s and L.P.N.'s who are scheduled at least eight hours weekly are part of the bargaining unit.

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[28] Delegates were employee representatives elected by the unit employees and functioned essentially as shop stewards. There were about four delegates at West Haven. Maynard was a delegate not in the RN-LPN unit, but in a unit of service and maintenance employees, also represented by the Union under contract.

> We thought this issue was resolved in May thru our agreement with Mr. Wayne Chapman. It is apparent by your failures that the issue is not settled. Your failure to submit to the Union Records of newly hired bargaining unit members, your failure to inform new employees that they must join the Union and inform them of the benefits they are entitled to under the contract, and your failure to deduct and submit Union dues for these members, is a direct violation of our Bargaining Unit Agreement and a violation of Labor Laws.

At a meeting on June 12, the issue was raised by Allen again. Respondent was represented by Jay Begley, human resources representative assisting Chapman, and Mark McCarroll, area manager, and Miller. Respondent again took the position that all the RNs were supervisors not covered by the contract.

Allen observed that the previously requested information had not been provided so that the Union's position was based on the only source of information available to it, namely, employee work schedules, which showed that these employees belonged in the contract unit. She requested that the Respondent, if they had information that showed otherwise, should provide it. It was agreed to meet again with Chapman.

A meeting was held on June 16 with Chapman. Respondent maintained its basic position that all the RNs were supervisors and not unit employees, but he agreed to investigate and discuss the matter again.

Subsequent efforts to resolve the matter with Chapman were unsuccessful and on June 28, the Union filed an unfair labor practice charge with the National Labor Relations Board, later amended on August 10.[29]

Miller discussed the matter with Respondent's labor attorney, who instructed her not to provide the information that had been requested but, instead, to provide a partial list of RNs and LPNs and to maintain the position that even as to those on the list submitted, Respondent was taking the position that they were not unit employees; and by letter to Allen dated August 25, Miller provided to Allen a list of 11 names, addresses, and rates of pay. The pertinent portion of the coveting letter reads as follows:

> Enclosed please find name, address and rate of pay information with regard to the list of RN's and LPN's as per your request.
>
> We are providing you with this information, however, it is our opinion that these individuals are employed in a supervisory capacity at the West Haven Nursing facility.

It appears that the matter was resolved as a part of negotiations for a new contract in October 1989.

2. Discussion and analysis

It is axiomatic that an employer has the obligation under Section 8(a)(5) of the Act to furnish, on request by the collective-bargaining representative of its bargaining unit

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[29] A union grievance on this issue was filed on July 10.

employees, that information necessary and relevant to the Union's collective-bargaining function.

In this case, an issue arose between the parties about whether or not certain RNs and LPNs were included in the contract unit in circumstances when they were hired through employment agencies.

In May, Respondent agreed to the general proposition that those employees hired by Respondent as "independent contractors" were covered by the contract, but continued to maintain that even so, they should be excluded from the unit either because they worked less than the number of hours required for inclusion within the contract unit, or because they had supervisory status. In order to better evaluate this contention, the Union, by Maynard on June 1 and later reiterated by letter from Miller on June 8, sought a listing of names, addresses, and rotes of pay for the current regularly scheduled RNs and LPNs at the facility.

This information was not furnished in any form until after the unfair labor practice charge was filed, and even then, it was incomplete.

In my opinion, the information requested was relevant to the Union's function as the collective-bargaining representative of the contract unit employees. The basic issue was whether or not Respondent was employing contract unit employees without affording them union coverage as a part of the contract unit. The Union was seeking basic information for the purpose of intelligently pursuing the issue.

Unlike Respondent, I do not deem it significant that the original request was made by Maynard, who was a delegate from a different contract unit. There can be no doubt based on this record, particularly Allen's followup letter to Miller on June 8, that Respondent was aware that this information was being sought by the Union pursuant to its

effort to resolve the independent contractor in issue involving the RN-LPN unit.

Respondent argues that the request for information was ambiguous and equivocal. This was not the case. Even assuming that Respondent may have entertained some doubt about what information was originally requested by Maynard at the June 1 meeting, any doubt was clarified by subsequent meetings between the parties, and particularly by Allen's June 8 letter to Miller wherein Allen was specific about the information being sought.

Respondent also argues that the request for information was somehow lawful because it was subordinate to the primary discussions about the supervisory status of RNs. This is an artificial distinction. The information sought was basic to the entire issue. Respondent, after agreeing that independent contractors were covered by the contract, neutralized that concession by continuing to seek their exclusion from the unit, either as part-timers or supervisors, and the information requested was certainly germane to the basic issue of their status as unit employees.

Finally, Respondent contends that failure by the Union to follow up its request legitimized Respondent's failure to provide the information. I disagree. The request, once made, was never withdrawn or abandoned and was, in fact, subsequently renewed. When it was not provided an unfair labor practice charge was filed based on that refusal.

In summary, the information requested is clearly necessary and relevant to the Union's function as collective-bargaining representative of the unit employees and Respondent's refusal to furnish that information constitutes a violation of Section 8(a)(5) of the Act.

G. Mark Twain Hospital Facility,
San Andreas, California

Statement of the Case

The complaint, on a charge filed by Gladys Hahn, an individual, was issued on August 20, 1991, alleges that Respondent unlawfully caused Hahn's discharge by instructing Med Pool, an employment agency providing medical personnel, not to refer Hahn for employment. The complaint further alleges that Respondent interfered with Hahn's employee rights under Section 8(a)(1) of the Act by instructing her to "cease involving other employees in her complaints about Respond-ent's system of providing supplies for its employees and the negatives effects that supply system was having on employees' working conditions."

1. Facts

a. *Joint employer*

Respondent operates a skilled care nursing facility at San Andreas, California, called the Mark Twain Hospital facility. The facility operates on three shifts; 7 a.m. to 3 p.m. (days), 3 p.m. to 11 p.m. (p.m.), and 11 p.m. to 7 a.m. (midnight). Hahn, a LVN was referred to Mark Twain by Med Pool, a medical personnel agency in the business of providing temporary medical service employees to various medical and nursing facilities, including Mark Twain. It appears that Med Pool was reimbursed by Respondent for the services of those individuals referred. It was Med Pool who set the wage schedules and paid the referred employees. Med

Pool also made appropriate payroll deductions from the wages of the employees being referred.

It appears that the practice had been for the facility to advise Med Pool on a monthly basis, whatever shifts needed to be filled. Med Pool would contact Hahn, who would choose some 20 shifts, almost exclusively the night shift. While employed at the facility, it was the facility rather than Med Pool who determined the working conditions of those referred, including shifts, work schedules, and hours. Med Pool referrals, including Hahn, operated under the policies and procedures established by the facility and, while employed, they were subject to supervision by facility management.

b. *Hahn's supervisory status*

During the period from November until February 1989, Hahn worked, as noted above, approximately 20 days per month on referral from Med Pool to the Mark Twain facility. With few exceptions, she worked exclusively on the night shift, and always as charge nurse. Hahn testified that as charge nurse on the night shift, she was the highest authority and the only licensed nurse at the facility during that shift. She was responsible for the care of all of the approximately 98 patients at the facility for the duration of that shift. In the event some extraordinary problem arose, it would be necessary for Hahn to telephone the DON or the administrator at their homes. The night shift also employs some three or four CNAs.[30] Hahn testified that it was her responsibility to

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[30] The Union represents, under contract, effective November 1, 1989, through September 1, 1991, a unit of service and maintenance employees, specifically including CNAs, but

supervise the work performed by the CNAs and that they reported to her. Further, that she had the authority to discipline the CNAs although she did not exercise that authority during the 4 months she worked at the facility. With respect to the matter of her authority, it appears that Hahn directed the nursing assistants in the performance of their patient care duties. Hahn also testified that she had the authority, which she exercised, to reassign CNAs from one wing to another or from one job to another, as well as to work through or rearrange breaks and lunch periods of CNAs so as to ensure that patient coverage was maintained at those times and that the necessary work was being performed.

With respect to the matter of overtime, it appears that Hahn had the authority on her own initiative, without prior approval, to authorize overtime work and initialed timecards indicating approval of overtime. Sometimes this would occur on occasions, perhaps twice a week, when Hahn arrived at the facility shortly before the start of the night shift to discover an absent CNA.[31] At such times, Hahn would, when necessary, take it on herself to solicit a CNA on the departing shift to stay over to work a double shift. It also appears from the facility's pay records that Hahn, as well as other charge nurses, authorized overtime for lesser periods of time than an entire shift, as the job required. Hahn was paid an hourly rate of $16.50 an hour, plus travel expenses, while nursing assistants were paid about $5 an hour.

Jane Powell, a LVN charge nurse, who had been DON at the facility until October 1989, basically corroborated Hahn's testimony concerning the authority of the charge nurse

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specifically excluding LVNs and RNs.

[31] The shifts overlapped by 15 minutes to provide orientation for the charge nurse on arriving shifts.

LVN. Powell testified that Respondent employs at least one licensed nurse, either an RN or LVN, on each shift and that an RN is required day shift. The charge nurses may be either RNs or LVNs. Powell testified that charge nurses have the authority to allow CNAs to leave work early and when necessary direct them to work through their lunch hours. In addition, Powell testified, and company records in evidence show, that charge nurses participate in annual and probationary (90 days) written evaluations of CNAs, and also exercise the authority to issue written disciplinary warnings to CNAs on their shifts.

The record also discloses that the contract in effect during Hahn's employment also authorized charge nurses, presumably including Hahn, to hear and settle employees' grievances without consulting higher authority. Although the record does not disclose that Hahn actually settled any grievances in this way during the short time she was employed, the contract gives her that authority.[32]

c. *The 8(a)(l) and (3) allegations*

Facts--Hahn's concerted activity
and the 8(a)(1) allegation

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[32] At the time the collective-bargaining agreement was introduced into evidence, the General Counsel raised a question about whether or not the agreement was in effect during the time period relevant to the complaint. He conducted voir dire thereon, apparently satisfied himself, and expressed on the the record that he had no objection to admission of the contract (R. Exh. 2). Accordingly, and in view of the supporting record testimony on this issue, the General Counsel's contention made in its brief, that the contract lacks relevance because it was not actually signed until July 1990, is rejected.

The record discloses that in September 1990, Respondent changed its medical supply procedures to a centralized supply operation. The LPNs were given keys only to satellite supply cabinets but had no keys to the central supply cabinet that stored a larger inventory, as they had in the past. In late January, Hahn experienced a problem in obtaining keys to the central supply cabinet. She was trying to locate a doctor-prescribed feeding tube. Therefore, on Powell's advice, Hahn used a substitute tube that was available. A couple of days later, she needed a particular formula that was located in the central supply cabinet and had to call Administrator Joe Stynes at home to come in with the keys to obtain the formula. Later in the day, Hahn complained to some nurses coming on to the day shift about the supply problem and they advised her that they, too, were having a problem on the day shift because only Stynes and Office Manager Debbie Thomas had the keys to central supply.

On the night of January 31, Hahn had another problem lo-caring a feeding tube in the size prescribed. There were none in the satellite supply cabinet. This time, however, she decided not to call Stynes but rather to sterilize and reuse a tube of the correct size that had been discarded in a waste paper basket by a nurse on the prior shift after a failed effort to feed a patient on that shift. Hahn reassured the three CNAs working with her that this would not adversely affect the patient.

Later into the night shift, Hahn wrote a note to Stynes reading:

> Dear Mr. Stynes,
>
> I need a key to Central Supply. I do not have the time to spend searching med carts and

> cabinets for supplies. I have 98 patients that I'm responsible for their care and they are important to me to give them my time instead unlocking cabinets, digging in cupboards and than [sic] not finding needed supplies. This has happened on several occasions. I will be responsible for any missing items if this seems to be the problem.
>
> Sincerely,
> Gladys M. Hahn LVN
> Night shift
> witnessed by Diana R. Clark cna
> Duston Shadden cna
> Patricia Lei cna

Hahn testified that she requested the three CNAs to sign the note as witnesses because, "I felt, for my protection, though, that it would protect myself as far as being responsible for these patients that it needed witnesses." Hahn then placed the note under Stynes' door.

The following morning, about 7 a.m., Stynes called Hahn to his office and asked for an explanation of the note. Hahn explained to him the problem she was having with access to supplies on the night shift and that the other nurses were having the same problem with the central supply system.[33] Stynes said that the satellite system had worked at other facilities and that it was implemented at the Mark Twain facility because of theft problems under the satellite system.

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[33] None of these individuals appeared as a witness at the hearing. Hahn was the only witness called by the General Counsel.

Hahn worked until February 8 but was not sent thereafter. Actually, all the Med Pool shifts, including Hahn's, for the remainder of February were cancelled. Powell testified that it was their intention to reduce expenses by using the facility's own employees. Most of the remaining shifts in February, for which the facility had used registry nurses, were filled either by facility employees or another referral agency. Powell's unrebutted testimony is that she offered Hahn a job as a full-time employee at this time but that Hahn declined, saying that she could make more money being referred by Med Pool.

2. Analysis and conclusions

a. *Joint employer*

In determining whether the Respondent together with Med Pool comprise a a joint employer under the Act, the Board has concluded that no single factor is controlling and that the "essential terms and conditions" of the relationship must be reviewed in determining joint employer status. As the Board concluded recently in *Pitney Bowes, Inc.*, 312 NLRB 386, 387 (1993):

> The Board will find that two separate entities are a joint employer when they share or codetermine those matters governing the essential terms and conditions of employment. *Rawson Contractors,* 302 NLRB 782 fn. 6 (1991). To establish joint employment status, there must be a showing that the employer meaningfully affects matters such as hiring, firing, discipline, supervision or direction; routine or minimal supervision of employees is

insufficient to support a joint employer claim. *Laerco Transportation & Warehouse,* 269 NLRB 324, 325-326 (1984).[34]

Respondent contends that it had no meaningful role in decisions regarding hiring, firing, discipline, or supervising the day-to-day direction of Hahn's work. I disagree. Although Med Pool registrants were first prescreened, then referred and paid by Med Pool, it was Respondent who requested their employment and reimbursed Med Pool for their wages. Those referred, including Hahn, were accountable to the Respondent for adhering to whatever regulations, working conditions, work rules, practices, policies, and supervision were in effect at the facility. See *Continental Winding Co.,* 305 NLRB 122 (1991). In my opinion, the extent of Respondent's involvement in the essential terms and conditions of the employment relationship satisfies me that Respondent together with Med Pool constitute a "joint employer" under the Act, and that Hahn was employed by this joint employer.[35]

b. *Hahn's supervisory status*

The protection of the Act against discrimination by employers is limited to those individuals who are non-

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[34] In a footnote, Member Raudabaugh agrees with the result, but would consider "all" terms and conditions of employment as well as essential ones.

[35] Respondent contends that General Counsel's failure to join Med Pool as an indispensable party in this case justifies its dismissal. This contention was raised by Respondent in a motion to dismiss at hearing. The motion was denied at the time and and is reaffirmed herein.

supervisory employees. In order to determine who are supervisors, and thus excluded, the Act sets out in Section 2(11) a definition setting forth the criteria to be used in deciding that issue. It reads:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It appears that the Board, in developing the concept of what constitutes a supervisor in the health care industry, has concluded that a nurse's duties in directing aides in the exercise of professional judgment related to the delivery of treatment to patients is not authority exercised in the interest of the employer so as to confer supervisory status under Section 2(11) of the Act. *Ohio Masonic Home,* 295 NLRB 390 (1989); *Presbyterian Medical Center,* 218 NLRB 1266 (1975). Although this approach has been approved in some U.S. Circuit Courts of Appeal,[36] it has been repeatedly

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[36] For example, *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983); *Mesericordia Hospital Medical Center v. NLRB,* 623 F.2d 808 (2d Cir. 1980); *NLRB v. Walker County Medical Center,* 722 F.2d 1535 (llth Cir. 1984); *Waverly-Cedar Falls Health Care Center v. NLRB,* 933 F.2d 626 (8th Cir. 1991).

rejected by the Sixth Circuit, which forum has concluded, essentially, that the business of the employer is patient health care and that nurses necessarily "act in the interest of the employer" when they direct subordinates in the delivery of patient health care.[37]

In the instant case, Hahn alone supervised the entire work force of nurses at the facility on the night shift. There was no higher authority on the premises. She granted time off. She authorized overtime. She rearranged rest breaks and meal breaks to cover the patients. She possessed the authority to resolve grievances under the contract. Like other charge nurses, she had the responsibility to prepare probationary and annual work performance evaluations, and she had the authority to issue written disciplinary warnings to CNAs.

In *Northcrest Nursing Home*, 313 NLRB 491 (1994), a recent representation case involving the same Employer as the instant case, the Board undertook a comprehensive analysis of the charge nurse/supervisor issue. Like the instant case, the LPNs were employed as charge nurses at one of the Respondent's nursing home facilities located in Ohio. The Board on the facts of that case concluded that LPN charge nurses were not supervisors. The Board reviewed and rejected those factors that suggested that any of the indicia of supervisory authority had been met. Those factors reviewed included the assignment and direction of nurses aides by the charge nurses, discipline by charge nurses, personnel evaluations by charge nurses, ratio of charge nurses to employees, and the fact that at times charge nurses are the highest ranking personnel at the facility. Other indicia of supervisory authority rejected by the Board include the fact

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[37] *Beverly California Corp. v. NLRB*, 970 F.2d at 1553; *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d at 1079.

that most charge nurses are paid twice as much as aides and are provided with twice as much life insurance.

Whatever conflict or conformity may have existed between the holdings of the Board and the holdings of the courts in the various Circuit Courts of Appeal, the matter appears to have been put to rest by the U.S. Supreme Court on May 23, 1994, in *NLRB v. Health Care & Retirement Corp.*, No.92-1964. In that case, in a five to four decision, the Court specifically rejected the Board's position taken in *Northcrest Nursing Home,* supra, that nurses directing aides in the delivery of health care services to patients were not exercising authority in the interest of the employer, and hence are not supervisors within the meaning of Section 2(11) of the Act. In rejecting the Board's holding, the Court, at page 6, alludes to its holding in *NLRB v. Yeshiva University.*, 444 U.S. 672 (1980), a case in which the Court had reversed a holding by the Board that faculty members were not managerial because they "exercised [authority] in the faculty's own interest rather than in the interest of the University." The Court states:

> The Board's reasoning fares no better here than it did in *Yeshiva.* As in *Yeshiva,* the Board has created a false dichotomy--in this case a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of nursing home patients, who are the employer's customers, is in the interest of the employer. See *Beverly California,* supra, at 1553. We thus see no basis for the Board's

> blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.

Accordingly, given the exercise of the supervisory criteria disclosed by this record, I conclude that Hahn was a supervisor within the meaning of the Act and the Respondent did not violate Section 8(a)(3) of the Act in discharging her. Likewise, given Hahn's supervisory status, those allegations that Respondent interfered with any Section 7 employee rights within the meaning of Section 8(a)(1) must also fail.

H. *Beverly Manor Convalescent Hospital Facility, Monterey, California*

Statement of the Case

The complaint alleges, based on charges filed by Hospital and Health Care Workers, Local 250, SEIU, AFL-CIO, CLC (the Union or the Charging Party), that Respondent at its Beverly Manor Convalescent Hospital facility located in Monterey, California, violated Section 8(a)(3) of the Act by discharging employees Shelly Jorgensen,[38] Nelia Aldape, Carmelita Panganiban, and suspending Josie Tillman. Further, that Respondent violated Section 8(a)(1) of the Act by certain misconduct, including interrogation, threats, surveillance, solicitation of grievances, and various other statements alleged to be unlawfully coercive. Respondent's answer was amended at the hearing to reflect the affirmative defense that Tillman, Panganiban, and Jorgensen are supervisors and thus excluded

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[38] Jorgensen has married, taken the marriage name of Guest, but will be referred to herein as Jorgensen.

from the coverage of the Act. The hearing was held before the administrative law judge on April 1, 2, 3, 6, and 21, all in 1991, in Carmel, California.

1. The alleged unfair labor practices

a. *Facts*

(1) Supervisory status of Shelly Jorgensen, Josie Tillman, and Carmelita Panganiban

Beverly Manor Convalescent Hospital, located in Monterey, California, is a 99-bed skilled care nursing facility providing 24-hour-a-day health care to mostly elderly patients. The workday is divided into three shifts, 7 a.m. to 3:30 p.m., 3 to 11:30 p.m., and 11 p.m. to 7:30 a.m. The half-hour overlap accommodates a transition between shifts. The overall supervision of the facility is the responsibility of an administrator. Below administrator, the hierarchy consists of the DON an ADON.

On each shift, there are two nursing stations. Each of the two nursing stations are staffed by either one or two charge nurses who are either RNs, like Jorgensen, or LVNs, like Panganiban and Tillman, and anywhere from two to six CNAs, depending on the shift. On the day shift, there are two charge nurses on a station, one is responsible for the desk, noting doctors' orders for patients, making medical appointments for the patient on doctors' orders, and keeping patient charts while the other is charged with the responsibility of administering medications. These responsibilities are interchanged between the two nurses. Charge nurses function either as the desk nurse or as the medications nurse as assigned by the DON.

All the RNs or LVNs employed at the facility work as charge nurses, with the exception of a single RN who is the director of staff development.

As noted above, Tillman and Panganiban are LVNs while Jorgensen is an RN. All were hired by Respondent as charge nurses and functioned in that capacity.[39] Tillman normally worked from 3 to 11:30 p.m. Panganiban and Jorgensen were part-time employees with Panganiban working about 3 days a week from 11:30 p.m. to 7 a.m. and Jorgensen working weekends from 3 to 11:30 p.m. although she sometimes worked additional shifts. It is undisputed that all were hired as charge nurses.

With respect to patient care, the charge nurse has the authority to assign CNAs to individual patients and also the authority to coordinate with charge nurses at the other nursing station to transfer CNAs to provide sufficient overall coverage at both nursing stations to cover nursing shortages. Charge nurses also have the authority to call in replacements for CNAs who call in absent prior to their shifts, and to use their own judgement in selecting those replacements. Tillman testified that she had a list of CNAs who usually worked overtime and called them as replacements when the need arose.

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[39] Panganiban and Jorgensen were hired through South Bay Nursing Pool, a referral service owned and operated by Respondent to staff Beverly facilities in the area. It does not refer to other employers. Respondent's area manager sets the pay and fringe benefits for employees referred by South Bay. Employees referred by South Bay receive a higher wage rate but lack fringe benefits such as health care insurance. Jorgensen and Panganiban opted for the higher hourly rate as referrals from South Bay.

The CNAs are entitled to a 30-minute lunchtime and two 15-minute break periods per shift. The record discloses that it is the responsibility of the charge nurses to assign lunchtimes and to arrange the breaktimes among the various CNAs to insure that patient coverage is maintained at those times.

With respect to the matter of discipline, Susan Chavis, administrator, testified that the charge nurses have the authority to issue written disciplinary warnings for misconduct occurring on their shifts. Although Tillman, Panganiban, and Jorgensen testified that they neither had nor exercised such authority, Tillman testified that she had written up a CNA for sleeping, however, there was no management followup to her written writeup. Regarding the other charge nurses, numerous written "Employee Disciplinary Repons" were made by them and were introduced into evidence.

The record also discloses the work performance evaluations were made by charge nurses appraising the work of the CNAs. These "Nursing Assistant Evaluations" were used, together with other factors, to determine if CNAs would be retained after a probationary period and to evaluate performances for annual wage increases.

It is undisputed that LVNs were paid $13 to $15 per hour with RNs receiving somewhat more. Jorgensen was paid an hourly rate of $21 per hour. CNAs were paid substantially less, between $6 to $8 per hour. In the matter of vacations, LVNs received 2-week vacation after a year of service while CNAs received only 1 week.

(2) Discharge of Shelly Jorgensen
and 8(a)(l) allegations

At all times relevant to these allegations, the administrator of the Monterey facility was Ron Huber and the DON was Lynn Hopkins. In November 1989, Jorgensen was hired at the Monterey facility as a registered nurse for part-time employment. Jorgensen was hired for Saturday and Sunday employment on the 3 to 11:30 p.m. shift, but sometimes worked on other days up to 30 hours per week.

Jorgensen testified that early in her employment, late December or early January, she was approached by Ophelia Mallari, described as the receptionist at the facility, who told Jorgensen that there was discontent among the Filipinos on the staff because of what they regarded as discriminatory treatment, and Jorgensen agreed but told Mallari that it would be better not to discuss it at work. She agreed to call Mallari at home, which she did that night. Mallari told Jorgensen about the problems, particularly the discrimination against Filipinos, and wanted to hold a meeting at her house to discuss it. Jorgensen felt that it would not be appropriate, as a licensed nurse, to participate in such a meeting but agreed that she would not disclose the information to anyone else.

About the same timeframe, Jorgensen met with Lita Rojas, a LVN at the facility, at Rojas' home. The subject of organizing the licensed nurses, presumably RNs and LVNs, was explored.

In early January at the nurses station at the facility in a conversation with two CNAs, Janet Frank and Gregg Mapp, she was told by Mapp that they were both supporting the Union and that Local 250 had been contacted by Mapp. Further, that he had spoken to a union representative and that they were going to make an effort to organize the facility.

Sometime during the following week, on a weekday, Hopkins called Jorgensen at home about dinner time. Hopkins asked Jorgensen if she could come down to the facility for a

meeting. Jorgensen explained that she was not able to come at that time because of her children and family obligations. Jorgensen asked if the matter concerned her professionally and Hopkins said it did not. Asked if it was serious, Hopkins replied that it depends on what you considered serious.

On the following Saturday before the start of the normal shift at 3 p.m., Jorgensen's husband took a call from Hopkins to the effect that Jorgensen had been taken off the schedule and was not to report to work. When Jorgensen received the message, she called Huber to find out why she was not working. Huber told her that Mallari had told him that she had discussed the Union with Jorgensen and that Jorgensen had discussed the Union with two other employees. He asked her if other employees were involved with the Union, and Jorgensen told him that they were. Huber asked who they were, but Jorgensen refused, saying that she did not have to tell him that. Huber blamed her for the union activity at the facility, telling her that she should have told him about it so that he could have stopped it. He explained that it was Respondent's position that licensed nurses could not be in the Union. He went on to explain that in order to work at the facility, she would have to participate in an antiunion campaign and attend meetings held by Respondent to learn about the Respondent's philosophy about unions and that licensed nurses did not belong in the Union. Jorgensen said that she did not think that she had to attend those types of meetings. Huber also told her that she could not work until she spoke to Hopkins.

After speaking to Huber, she called Hopkins and asked why she was removed from the schedule. Hopkins told her that she had been involved with the Union and that before she could come back, she would have to learn Respondent's philosophy about unions and have a counselling session with

Huber. She asked if she were fired and Hopkins told her she was not. Jorgensen was never returned to the schedule, however.

Jorgensen also called Deborah Jackson, central supply supervisor and staffing coordinator, who made up the work schedules. Jackson told her that she had been told by Hopkins to remove Jorgensen's name from the schedule but did not know why. Jorgensen testified that in a later conversation, however, Jackson confirmed that she was taken off the schedule because her union involvement violated Beverly policy. Jackson testified to only one conversation with Jorgensen when she told Jorgensen that she did not know why Hopkins had her removed from the schedule. Jackson never denied telling Jorgensen that she was removed from the schedule for union considerations, however, and, having reviewed the entire record, I am satisfied that with respect to any conflict in their testimony, Jorgensen was the more credible witness and that she was told by Jackson that she was removed from the schedule because of her union involvement.

Within a month of being removed from the schedule, Jorgensen was offered full-time employment by Respondent, but declined it because of other responsibilities.

Some months later, Jorgensen received a letter signed by "Jim Wood, Human Resources Generalist," dated March 23, 1990, inquiring about Jorgensen's availability for employment. Jorgensen called Wood and asked if this was some kind of a joke, because she had been terminated because of her union involvement. Wood said that he had heard she was terminated for refusing to attend the meeting. Jorgensen asked about getting a reference from Beverly. Wood declined, saying that she was a supervisor and that as a supervisor engaged in union activity, she was going to be sued by Beverly. Further, that the facility had become a "mess"

because of her. Wood also told her to take the matter up with South Bay.

Jorgensen then called South Bay but roached a new employee who was totally unaware of the matter.

(3) Discharge of Nelia Aldape and 8(a)(1) allegations

Nelia Aldape was a CNA on the afternoon shift, working from 3 to 11:30 p.m., the same shift on which Tillman was a charge nurse. On June 24, 1991,[40] Aldape was given a "Written Warning" for an incident in which the daughter of a patient complained about her mother's treatment. Aldape felt that she was not at fault and that the writeup was not justified. Thereafter, she began to consult with other employees to discuss their dissatisfaction with their employment, especially the matter of being issued disciplinary warnings without justification, and explored with them their interest in obtaining union representation. Within a few days of being issued the written warning, she and Tillman began to circulate a petition indicating that those signing it desired union representation.

Shortly thereafter, Aldape contacted a representative of the Union, and told him about the petition and signatures. She told him that they wanted to be represented by the Union. He was not encouraging, but a meeting of employees was scheduled for July 12 at the offices of a travel agency operated by Aldape and Panganiban. It was during this same time period that Julia Michaels, ADON, testified that in a conversation with Chavis about the organizational activity,

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[40] All dates refer to 1991 unless otherwise indicated.

Chavis told Michaels that they would have to discharge Aldape and Tillman because of the Union.

Previously, on or about July 5, Chavis had learned that a petition was being circulated at the facility and called Ronald McKaigg, Respondent's area manager, to bring the matter to his attention and on Sunday, July 7, when McKaigg came to visit the Monterey facility. A meeting was called for the afternoon of July 7. Some 25 employees from the day and afternoon shills attended, as well as staff representatives, including Chavis. McKaigg addressed those present, indicating that he had been made aware that the employees at Monterey were organizing, and he asked them why. He observed that he had made himself available to the employees and that he would like to have been notified. He asked them why they were starting problems. Some employees voiced their displeasure at what they regarded as the arbitrary issuance of written disciplinary actions. Aldape specifically complained about her own warning on June 24, to which McKaigg responded that it appeared to him to be justified. McKaigg also told them that he did not like unions and recited an incident occurring sometime ago wherein he crossed a picket line and was later beaten up and had his car vandalized. McKaigg testified that he did address the employees on July 7 and told them that he had heard about the petition being circulated and could not understand it because Beverly had a chain of command to follow with grievances, namely, to the facility administrator and to the area manager. He said it made no sense to organize and pay $40 a month union dues that could buy a lot of groceries. He also reminded them of an 800 number that they could call with their problems. McKaigg testified that several employees aired their grievances, however, he did not solicit them. He could not recall asking

them why they wanted a union or asking them to notify him if they had a problem.

Following McKaigg's speech, Chavis testified that McKaigg, in conversation with her concerning the circumstances of Aldape's written warning of June 24, brought to her attention that the patient abuse disclosed thereon was a dischargeable offense and that Aldape should not have been given only a written warning, but rather should have been suspending pending an investigation to determine if discharge was warranted. He directed her to follow up the matter. Chavis undertook this action by soliciting a written statement from the patient's daughter, concerning the incident. The statement, dated July 8, reads:

> To Whom it may concern,
>
> Nelia Aldape has been rude and mean to my mother. While left standing alone she broke her arm. Nelia stated, "Too bad, she shouldn't have been standing by herself." When my mother has asked her to hang up her clothes, she has instead thrown them on the closet floor. She also has stated that it wasn't her job to help my mother, she was only helping someone else out.
>
> She has stated, "She doesn't have to work at this job-she has her own business, one being a travel agency."

Chavis also told Janis Asfoor, director of nursing, that they were reopening the investigation of the incident and that Asfoor was to call Aldape and tell her that she was being suspended for 3 days pending an investigation. On July 12

Asfoor telephoned Aldape at her home. Tillman, who was at Aldape's house for a union meeting set for later in the day, listened to the conversation on an extension phone. Tillman testified that Asfoor, while advising Aldape about her suspension, admitted to Aldape that the cause of the suspension was the fact that Respondent had learned that she was engaged in an organizational effort.

Later in the day, on July 12, employees gathered in an office at Aldape's travel agency. It was then the union representative gave Aldape authorization cards with the understanding that they needed to get 30 or 40 cards signed by Monday, July 15. Aldape and Tillman succeeded in obtaining signed authorized cards from about 15 employees, which were submitted to the Union.

Three days later, on July 15, Aldape returned to the facility for her regular afternoon shift beginning at 3 p.m. On her arrival, she was directed to Chavis' office. Tillman, the charge nurse on the shift, was also there as was Bernice Anello, another supervisor. At this meeting, Aldape was advised by Chavis that she was being terminated because of the patient abuse incident. Aldape was given a written "Recommendation for Employee Termination" form showing a recommendation for termination effective July 15. The form is without any recital of specifics, only a box checked off stating termination for "gross misconduct."

The record discloses no evidence of prior warnings or disciplinary actions with respect to Aldape. Chavis testified that she was unaware of any prior patient abuse complaints concerning Aldape.

Later on July 24, Jay Laws, human resources representative, came to the facility for a visit. During his visit, he held several meetings with different groups of employees from the various shifts. Laws testified that he had

no specific recollections about the meetings, except that he was able to testify that he did not ask any employees why they wanted a union, nor even mention the Union in his talks. Employee Alicia Nagtalon testified, however, that Laws met with a group of some approximately seven employees on July 25 or 26 about 10 p.m. and during that conversation asked them why they were forming a Union. Rita Carlos, another employee, responded that they needed protection from arbitrary writeups. Nagtalon testified that in responding to their concerns, Laws told them, in essence, that unions were too much trouble in the health care business.

(4) Tillman's suspension

After Aldape was given the written reprimand, noted above, on June 25, both Aldape and Tillman circulated an organizing petition among employees and sometime in late June, Asfoor discussed with Michaels the role that Aldape and Tillman were playing in the organizing drive. When Ron McKaigg came to the facility and spoke to the employees on June 30, Tillman was quite vocal in expressing her dissatisfaction with the work environment, particularly about the unfair issuance of written disciplinary warnings.

On July 9 Michaels called Tillman into her office. She told Tillman she was going to have to issue a verbal warning, in written form, for failing to timely arrange for a radiation treatment for a patient pursuant to a doctor's order. Tillman protested that it was not her responsibility to make those arrangements because she was not the charge nurse on that shift; and that, in fact, Michaels herself had been working as the charge nurse on that day and so she had the responsibility.

On July 18, when Tillman reported to work at 3 p.m., she was called into a meeting with Chavis, Asfoor, and

Michaels. At the meeting, she was advised by Chavis that she was being given a 3-day suspension, pending an investigation of the matter. After having investigated the matter, Chavis determined that as charge nurse on that day, it actually was Michaels who had the responsibility for arranging for patients' radiation treatments. Tillman was reinstated, with backpay, by Chavis on July 22, the same day that Chavis gave Michaels a 3-day suspension for blaming Tillman for failing to make arrangements that were actually her own responsibility. Michaels did not return to the facility after her suspension, apparently resigning her position.[41]

(5) Panganiban's discharge

Panganiban was hired by the DON at the facility as a regular part-time LVN in January 1991. She was given and selected the option of being employed as a pool nurse through South Bay at a higher rate of pay without benefits. Thereafter, she had no contact whatever with South Bay except that they issued her paychecks.

When Aldape began her efforts to organize Respondent, Panganiban signed the organizing petition that was being circulated among the employees. She also attended a representation case heating on August 8, 1991, where she sat with Aldape. Chavis also attended the hearing. Chavis was aware of Panganiban's presence and they knew each other from contacts at the facility.

Panganiban was scheduled to work on the following day, August 9, but, because of an emergency in the family,

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[41] Although Michaels was called as a witness for the General Counsel, she was not examined by the General Counsel concerning Tillman's discharge.

she was not able to work on August 9. She called the facility on the evening of August 8 and advised them that she was unable to come to work on August 9. Panganiban was next scheduled to work on the p.m. shift on August 16. On August 16, however, about 9:45 a.m., she received a telephone call from Asfoor, telling her that she had been removed from the schedule and replaced. Although Asfoor has a somewhat different recollection of the conversation, the substance was the same, to wit, that Panganiban was being taken off the schedule. Panganiban asked why she was being removed from the schedule and Asfoor told her that she would call her back. Asfoor did not call Panganiban again, however.

About 5:30 p.m. on the same day, August 16, Panganiban went to the facility. A "going away" party was being held for Asfoor who was leaving the employ of the facility. At the party, Panganiban approached Asfoor again in an effort to find out why she had been removed from the schedule. Asfoor told her that she could not explain it and that the only person who could was Susan Chavis. However, Panganiban never sought an explanation from Chavis. Panganiban was not returned to the schedule. The record discloses no explanation for her removal, and Respondent's defense is only that as a supervisor, she was not protected under the Act.

On or about September 21, Panganiban was contacted by South Bay, asking if she would like her job back at the facility, but Panganiban declined, saying that she would not feel comfortable there after her experience in being removed without explanation from the schedule.

b. *Analysis and conclusions*

(1) Supervisory status of Shelly Jorgensen, Nelia

Aldape, and Josie Tillman

The Act, in Section 2(11), defines the term "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Supervisors are not entitled to the fights afforded to employees under the National Labor Relations Act and normally their discharges do not violate the Act.

With respect to the matter of the supervisory status of charge nurses, the Board recently set out, in some detail, the relevant considerations in determining supervisory status. In *Northcrest Nursing Home,* supra, the Board, in a representation case involving charge nurses employed by this Respondent at a nursing home facility in Ohio, reviewed the duties of charge nurses and concluded that they were non-supervisory employees.

As noted earlier herein, however, in connection with the supervisory status of Hahn at the San Andreas facility, the Supreme Court has rejected, as a false dichotomy, the Board's concept that nurses performed their services in the interest of patients rather than their employers, and held that nurses exercising what would otherwise be indicia of supervisory authority under the Act were supervisors. *Health Care & Retirement Corp.,* supra. In my opinion, and based on the authority and supervision they exercise in the instant case, I conclude that Jorgensen, Panganiban, and Tillman performed supervisory duties under the Court's holding in *Health Care,*

supra, and were supervisors within the meaning of Section 2(11) of the Act.

Accordingly, I find that Respondent did not violate Section 8(a)(3) of the Act in discharging Jorgensen, Panganiban, or Tillman. Moreover, because they were supervisors, neither did Respondent violate Section 8(a)(1) of the Act in making what are alleged as interrogation, threats, impressions of surveillance, and coercive statements to them.

(2) The discharge of Aldape and 8(a)(1) allegations

In order to prevail, the General Counsel must establish that Aldape's discharge was motivated by her union activity. In this case, there can be no doubt that Aldape was the instigator of the Union's organizational effort. After having been, in her own mind, unfairly reprimanded, she sought out union representation and employee support for the Union by circulating a petition, hosting an employee meeting, and soliciting union authorization cards. The question remains whether or not Aldape was discharged because of this union activity, and I am satisfied that there is clear and convincing evidence that this was the case.

Originally, Aldape was given only a warning for the patient abuse incident. Presumably, Chavis felt that this was the appropriate remedy for the infraction. Immediately thereafter, in response to this perceived mistreatment, Aldape sought out and promoted union representation. Chavis learned about it shortly thereafter. Chavis testified that she was advised on or about July 9 by McKaigg that Aldape's conduct was really a dischargeable offense and was told by McKaigg to follow up on the matter. She did this by reopening the matter and subsequently concluding that Aldape should be discharged for "gross misconduct" and discharging her on

July 15. The sequence of events is suspect. Could it be that Chavis, an experienced administrator, was unaware that patient abuse was a dischargeable offense and had to be so advised by McKaigg? It is more likely that the reassessment of the Donovan incident was in response to McKaigg's reaction to Aldape's union activity and his instruction to review the matter.

Another weakness in the Respondent's position is the question of the propriety of a discharge penalty for the alleged offense. No patient abuse allegation was ever established. Except for Aldape, none of those participating in the incident testified. The evidence adduced with respect to the incident itself was basically of the hearsay variety, insufficient to show, despite the complaint from the patient's daughter, that the incident did in fact occur.

Even accepting that the original warning was justified, there is no adequate explanation for reopening the matter. It does not appear that the patient's daughter was seeking more severe discipline for Aldape. In fact, it was necessary to solicit her to furnish a statement about the incident.[42] In short, the probative relevant evidence in this record does not establish that the patient was abused by Aldape.

But apart from the question of whether or not the original disciplinary memorandum was justified, there is direct evidence of unlawful motivation. When DON Asfoor called Aldape on July 12 to advise her of her suspension, she also told her that it was related to her union activity. Although Asfoor denies making such a statement, I am satisfied, based on the corroborating testimony of Tillman, that the statement was made. That statement is evidence of employer motivation

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[42] The statement is also hearsay and without probative value to establish that the incident, in fact, occurred.

to show that Aldape was discriminatorily discharged. It is also coercive in violation of Section 8(a)(l) of the Act. In addition, unlawful motivation for Aldape's discharge is also apparent from the remarks made by Chavis to Michaels to the effect that because of the Union Aldape and Tillman would have to be discharged.

Turning to the 8(a)(1) allegations regarding McKaigg, I am satisfied that his presentation was lawful. Although he wondered aloud why employees sought union representation when the Respondent offered viable alternatives, his remarks were not coercive. The question was not designed to identify union adherents and was essentially rhetorical rather than coercive interrogation. Nor does the evidence support the allegations of surveillance or solicitation of grievances. Merely stating that he was aware of an organizational effort is not sufficient to infer that McKaigg created the impression that employee union activity was under surveillance, and although McKaigg did point out existing procedures available to employees with work related problems, there was no solicitation of their grievances from which to infer any interference with employee rights guaranteed under Section 8(a)(1) of the Act.

Regarding Laws, having reviewed the relevant testimony, I am not satisfied that he unlawfully interrogated employees. Even crediting the General Counsel's witnesses, the question was rhetorical and essentially innocuous. Everyone was aware of a union organizational effort by late July and Laws' remarks could not be regarded as a serious effort to identify union supporters and the question was not otherwise coercive.

I. Slayton Manor' Nursing Home, Slayton, Minnesota

Statement of the Case

The complaint alleges that Respondent, at its Slayton Manor facility, violated Section 8(a)(1) of the Act by posting an unlawful no-solicitation rule, soliciting and adjusting employee grievances, creating the impression among employees that their union activities were under surveillance, and by threatening RN employees with discipline, including discharge, for speaking about the Union or failing to support the Respondent's position against the Union's organizational efforts.[43] A hearing was held before me on May 14 and 15, 1992, in Marshall, Minnesota.

I. Facts

a. *Threats of discipline to registered nurse employees*

The record discloses that on February 1 and 2, 1990, Barbara Katella, area human resources representative for Respondent, spoke from notes to the four RNs at the Slayton facility, telling them that they were supervisors excluded from the voting unit, and were expected to support the Respondent's position or at least to remain neutral and that making statements that did not support the Company's position would subject them to discipline, including discharge.

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[43] At the hearing Respondent amended its answer to admit the supervisory status of James Nelson, administrator; Barbara Katella, human resources representatives; Phyllis Saunders, area manager; and Martha Eke, administrator, and to correct a typographical error in its answer to reflect that pars. 2(a) through (d) were being denied. The parties also stipulated that Ruth Hoyme (DON) was also a supervisor within the meaning of Sec. 2(11) of the Act.

Katella went on to advise them of what activity, as supervisors, were lawful under the National Labor Relations Act and which were not. Among the RNs addressed by Katella were two RN charge nurses, Joyce Risacher and Deborah Anderson.

It is necessary first to review the record to determine the status of the RN charge nurses as either supervisors or employees. The staff at the Slayton facility consisted of an administrator, four RNs, about seven LPNs, and a number of NAs who performed the bulk of the hands-on patient care. The four registered nurses were Hoyme, Karen Molitor,[44] who worked 32 hours per week as the staff development in-service coordinator and 8 hours per week filling in for Risacher, and Anderson. The record discloses that in addition to the RNs, the charge nurses may also be LPNs. The charge nurses on the afternoon shift (3 to 11 p.m.) and the night shift (11 p.m. to 7 a.m.) are normally LPNs while the charge nurse on the day shift is normally an RN.

It appears that the charges nurses on all three shifts, whether RNs or LPNs, have the authority to assign and reassign NAs, as required to insure patient coverage. They have the authority, when circumstances warrant due to absenteeism, to call in employees as replacements. Charge nurses are also responsible for directing and correcting, when necessary, the work being performed by NAs and to prepare written evaluations of their work. When it is necessary to rearrange lunch or breaktimes to provide adequate staffing, charge nurses have the authority to make the necessary adjustments. Charge nurses also have the authority to

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[44] The General Counsel stipulated that Molitor is a supervisor, leaving only the status of Risacher and Anderson in issue.

discipline NAs when warranted. During work hours when the administrator and DON are not present in the facility, they are the highest management authority on the premises. At times when RN charge nurses were not on the premises, they were often designated as "RN on call" and as such were responsible to be available to the LPN charge nurses, particularly on the afternoon and night shifts, for extraordinary occurrences.

b. *The no-solicitation rule*

The Union's organizational effort began with employee meetings about November 1989. On or about December 13, 1989, the following longhand no-solicitation rule was posted at Respondent's Slayton facility:

> Attention 12/13/89 There will be no solicitation or distribution of material allowed on the property. Thanks, James A. Nelson, Administrator. Disciplinary action will be taken.

At the hearing, Respondent also introduced evidence to show that each employees at the time of hiring orientation was given an employee handbook wherein appeared the following rules regarding solicitation and distribution:

> NO SOLICITATION
>
> Solicitation by an employee of other employees is prohibited while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not

include meal periods, scheduled breaks, time before or after a shift in addition, solicitation is prohibited at all times in immediate resident care areas.

NO DISTRIBUTION

No person, employee, or otherwise, is permitted to, for any purpose, distribute written or other material during work time, with working employees in any work area or immediate resident care areas.

NO ACCESS RULE

Employees are not permitted access to the interior of the facility or outside work areas during their off duty hours, unless they are in the building to visit a resident. Such visits must be confined to the resident's room or such area designated for resident visitors.

NON-EMPLOYEES NO SOLICITATION, NO DISTRIBUTION AND NO TRESPASSING RULE

Solicitation, distribution of literature or trespassing by non-employees is prohibited on facility premises. Please immediately report any violations to your supervisor.

In addition, it also appears that for several years and to the present, there has been posted, at another location at the

facility, the same "rules" as those set out in the handbook, with the exception of the "No-Access rule."

c. *Creating impressions of surveillance*

At the Slayton facility, there is a nurses lounge, also referred to as the breakroom, where employees of the facility take breaks and eat their lunches. The lunchroom also has coffee and snack machines. It also appears that the breakroom was utilized by the management of the facility, including the administrator. Phyllis Saunders, area manager, who filled in as administrator after Nelson was terminated on January 9, 1990,[45] testified that she used the breakroom regularly for her own lunches and breaks, and sometimes for coffee. She also spoke and visited with employees in the lunchroom. Saunders testified that as administrator at another nursing home, she visited the breakroom there in the same manner.

Eke testified that after she began her employment as administrator, she also used the breakroom about three times a day for her own breaks and lunches and that the only purpose of her visits was to get coffee or to eat.

Katella testified that after she arrived at the Slayton facility, shortly after the election petition was filed on January 10, 1990, she also used the breakroom for breaks and lunches and that while she was there she sometimes drank coffee and conversed with the employees. She testified that her only reason for being there was for those purposes. She testified that her use of the breakroom was consistent with the way she used the breakrooms in other Beverly facilities she visited during the course of her employment.

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[45] Elke replaced Saunders as administrator in late January 1990.

It does not appear these individuals engaged in any organizing activity or any other activity that was out of the ordinary during their visits to the breakroom.

d. *Solicitation and adjustment of employee grievances*

After the election petition was filed on January 10, 1990, Katella was assigned to the Slayton facility to represent the interests of the Respondent during the Union's organizational campaign. She worked there 3 or 4 days a week until the election was held on March 1, 1990, which the Union lost. She was responsible for coordinating the Respondent's antiunion campaign and reported to James Wehrle, area human relations manager.

After she arrived, she conducted meetings of employees at the facility. She spoke at these meetings as did other various representatives of management. Katella testified that at the meetings she did speak to the employees about work related problems. She invited them to contact her about these problems and offered to do what she could to resolve them. She did not promise to change any existing policies or to provide any additional benefits.

The record discloses that several employees called Katella's attention to various work related problems. For example, one employee raised the matter of bonus points. Generally, this was a program designed to reward employees for good attendance by awarding points for discounts on the purchase of merchandise from a catalogue. Katella testified that the program had not been properly implemented by Nelson and took steps to revitalize the program. Again, some employees were unaware of their benefits under the HMO health care plan and Katella went about seeing that benefits brochures were distributed. One employee complained to Katella about

an overdue nursing certificate from the State of Minnesota and her failure to receive her HMO health care card. The certificate arrived later and Katella contacted the HMO to look into her health care coverage, as well as that of other employees.

Some employees asked about vacations. It appears that RNs and LPNs were entitled to 2 weeks of vacation after 1 year of service but some of them were being awarded only 1 week. Katella testified that she verified the policy and had the inequities corrected.

2. Analysis and conclusions

a. *Threats of discipline to registered nurse employees*

The Board recently concluded, on facts not substantially distinguishable from those of the instant case, involving the same Employer, that charge nurses at one of Respondent's nursing homes in Ohio were employees, rather than supervisors within the meaning of the Act. *Northcrest Nursing Home,* supra.

The Supreme Court, however, in *Health Care & Retirement Corp.*, supra, reached a different conclusion, rejecting the Board's theory and concluding that those nurses were supervisory employees. The facts in the instant case disclose that the RNs exercised authority normally regarded as supervisory under Section 2(11) of the Act. Because the Court held that this supervision is exercised in the interest of the employer rather than the patients, I conclude, following the above-cited holding of the Supreme Court, that those RNs were supervisors and not protected by the Act. As supervisors, Respondent did not violate Section 8(a)(l) of the Act in addressing them as alleged in the complaint.

b. *The no-solicitation rule*

As a matter of Board and Court precedent,[46] it is clear that the no-solicitation rule posted at the facility on December 13, 1989, was unlawfully broad because, by its terms, it prohibits solicitation and distribution on nonworktime in nonwork areas.

Respondent appears to concede that the no-solicitation rule posted on December 13 was unlawful as written, but argues that the employees had been made aware of their rights to solicit and distribute by the lawful rules set out in the employee handbook and by the posting of lawful solicitation rules at the facility.

But this argument begs the questions. Even assuming the legality of the handbook solicitation and distribution rules, there would then exist two rules, one lawful and one unlawful. The unlawful rule is not legitimized by the lawful rule. Accordingly, I conclude that the no-solicitation rule posted on December 13, 1989, interferes with employee organizing rights set out in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

c. *Creating impressions of surveillance*

Having reviewed the relevant testimony, I am satisfied that none of those alleged to have frequented the breakroom for the purpose of giving employees the impression that their union activities were under surveillance, were in fact so engaged. The evidence shows only that their visits to the breakroom were taken for the same reason that other

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[46] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

employees went there, to eat their lunches, get coffee, or some other lawful reason. Like other employees, they engaged in conversation while they were there. Nothing in the record suggests that they did anything out of the ordinary while so engaged to support the surveillance allegation, and, unlike the General Counsel, I cannot conclude, on the facts of this case, that their mere presence in the breakroom is sufficient to infer that employees were being given the impression that their union activities were under surveillance.

Briefly, the record is insufficient to warrant the conclusion that Saunders, Eke, or Katella created an impression among employees that their union activities were under surveillance. Accordingly, this 8(a)(1) allegation of coercion should be dismissed.

d. *Solicitation and adjustment of employee grievances*

Katella, a human resources representative, was sent by Respondent to orchestrate its election campaign against the Union. I am satisfied that had it not been for the union organizational effort, the employees would not have been invited to bring their problems to Katella, and while it does not appears that Katella was offering or promising the employees any benefits that they did not already enjoy, Katella's efforts on behalf of the employees in soliciting and adjusting their complaints and facilitating the receipt of their benefits does, in my opinion, interfere with the Section 7 fights of employees guaranteed in the Act.

J. *Kewaunee Health Care Facility, Kewaunee, Wisconsin*

Statement of the Case

The complaint alleges that Respondent, at the Kewaunee Health Care Center in Kewaunee, Wisconsin, by the administrator of that facility, Steven Bavers, violated Section 8(a)(1) of the Act by threatening employees with disciplinary action if they engaged in lawful handbilling activity.[47] The case was heard before me on May 20, 1992, in Stevens Point, Wisconsin.

1. Facts

The essential facts are not in dispute. It appears that John Grove, organizer for Local 99W/United Professionals for Quality Health Care (the Union), distributed to several local radio stations a press release describing the status of contract negotiations then underway at the facility and announcing the Union's intention to distribute informational pamphlets at the Kewaunee facility on Sunday, March 18, 1990. One of the newscasters contacted Bayers for comment. Bayers, apparently previously unaware of the Union's intentions, contacted Wehrle, who was conducting the contract negotiations for Respondent, seeking advice. Bavers testified that he was advised by Wehrle after Wehrle had spoken to an agent at the NLRB's office in Milwaukee, Wisconsin,[48] to issue a memo to the employees at the Kewaunee facility advising them that any leafleting without 10 days notice would

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[47] Respondent's answer was amended at the hearing to admit certain supervisory allegations and to correct the title of James Wehrle to "Regional Director, Human Resources."

[48] Neither Wehrle nor the Board agent testified, so obviously any purported conversation and its content are hearsay and will be disregarded by me as to these proceedings.

be unlawful under the Rules of the National Labor Relations Board and that employees who engaged in unlawful activity could be disciplined, including discharge. On Thursday, March 15, Bavers drafted and distributed the following memo to the employees at the employees, reading:

> To: All Staff
> FROM: Steven E. Bavers, Administrator
> DATE: March 15, 1990
> Subject: Notice by Union of Informal Leafletting for March 18th
>
> 1. The Company has been negotiating in bad faith with the Union. The last information we have is that the Union is reconsidering their position, and will send us suggested dates for future meetings.
>
> 2. It comes as a complete surprise that this action is planned in light of the above situation. It is shocking because under the National Labor Relations Board rules we are to be given a ten (10) day notice before such activity.
>
> 3. Since this action is in violation of those rules, it is an illegal action, and we are filing an unfair labor practice with the National Labor Relations Board.
>
> 4. I strongly discourage all staff from participation in any illegal action. I would have to consider disciplinary action if staff members were part of an illegal action.
>
> 5. If your have a question about this information, please call:

National Labor Relations
In Milwaukee (414) 297-3867
Ask For Mr. Schultz

The March 15 memo was posted on the company bulletin board and several copies were placed on the table in the nurses' lounge or breakroom, where it was seen by employees taking their work breaks in the lounge.

On Friday, March 16, Wehrle called Bavers again, this time to advise him that after further conversation with the agent at the National Labor Relations Board's Milwaukee office,[49] it appeared that while picketing would not be lawful, distributing leaflets would be lawful, and that it would be necessary to issue a followup memo to that effect at once and advised Bavers of what should appear in the memo. Because Bavers was on the road, he called DON Kathy Zuege and dictated a memo to her. That memo dated and posted on Friday, March 16, under Zuege's name, was distributed to employees in the same manner as the earlier memo. The March 16 memo reads:

To: All Staff
FROM: Kathy Zuege, Director of Nurses
Date: March 16, 1990
Subject: Notice by Union of Informal Leafletting for March 18th

"Informational leafletting" has now been determined to be an acceptable activity by the National Labor Relations Board office in

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[49] As noted earlier, any purported conversation between Wehrle and the Board agent are hearsay.

> Milwaukee, if it is limited strictly to that. Many of you were apparently under the impression that this was the same as "informational picketing," (based on your comments) which would be illegal in these circumstances.
>
> Leafletting, or the distribution of handbills, is permissible if it does not include picketing (including picket signs), "patrolling" or other blockage of access, disruption of facility operation, etc.
>
> We respect employees fights of free speech, but also urge all employees to follow the laws. Failure to do so may result in discipline or discharge!

It is undisputed that there was leafleting at the premises on Sunday, March 18, near the facility and at other locations. It appears, however, from the testimony, that the March 16 memo restrained certain employees from handbilling.

Thus employees Jean Ferron and Mary Murphy both testified that a factor in their decision not to handbill at the facility on March 18 were the threats contained in Respondent's March 15 memo. Murphy testified that even after reading Respondent's March 16 memo, she did not handbill because she was still unclear about what Respondent's interpretation and reaction would be to the scheduled handbilling.

2. Analysis and conclusions

In the instant case, Bavers learned that the Union intended to distribute leaflets. He called Regional Director of Human Resources Wehrle and apparently received bad advice. At Wehrle's direction, Bavers drafted and issued a memo that threatened employees who engaged in distributing informational leaflets with disciplinary action, including discharge. In fact, except under conditions not applicable herein, leafleting is a lawful activity. Clearly, therefore, Respondent was threatening employees with discipline for engaging in a lawful activity on behalf of the Union in support of the contract negotiations then underway.

Respondent, however, argues that by posting a second notice on March 16, it effectively repudiated the March 15 memo and was therefore absolved of any 8(a)(1) violation based on the March 15 memo and cites *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978); *Wireways, Inc.*, 309 NLRB 245 (1992); *Farm Fresh,* 305 NLRB 887 fn. 1 (1991). I do not agree. The record discloses that the March 16 memo was not effective as a repudiation. It did not, by its terms, identify and repudiate the prior memo, nor did Respondent acknowledge the unlawful prohibitions on handbilling contained therein. It was a general exposition of Respondent's views concerning the legality of picketing and handbilling, including a recital of what it viewed as lawful and unlawful handbilling and ending with an admonition to employees that failure to follow the law, presumably as set out by Respondent in the body of the memo, would result in discipline or discharge. Accordingly, I conclude that there was no repudiation, and that the March 15 memo constituted a threat

to interfere with the employee fights set out in Section 7 of the Act.[50]

K. *Golden Age Nursing Home, Tomahawk, Wisconsin*

Statement of the Case

The complaint alleges that the Respondent, through Administrator Peter Merchant,[51] violated Section 8(a)(1) of the Act at its Golden Age Nursing Home facility in Tomahawk, Wisconsin, by informing employees that it could deal with them better on a one-to-one basis if the facility were not organized. A hearing was held before the administrative law judge on May 20, 1992, at Stevens Point, Wisconsin.

1. Facts

A unit of nurses aides and various other employees had long been represented under contract by Service Employees International Union, Local 150, AFL-CI0 (the Union). In the fall of 1989, a contract for that unit was negotiated by Jim Wehrle, regional director human resources, assisted by Merchant.

On March 2, 1990, a grievance had been filed by Majorie Wanta, CNA and chief shop steward at the

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[50] In my opinion, a threat of discharge for engaging in lawful handbilling activity directed by the regional director of human resources is significant, not "de minimis," as Respondent contends, particularly when, as here, the record supports the conclusion that memos caused employees not to handbill.

[51] At the heating, Respondent amended its answer to admit Merchant's supervisory status.

Tomahawk facility, alleging that Respondent violated various provisions of the contract by excluding from contract coverage, those parttime employees working less than 17-1/2 hours per week.

On March 22, 1990, Wanta and Tammy Serizine, assistant shop steward, met with Merchant in his office to discuss various labor related issues. Later in the meeting, the matter of the grievance was raised. Wanta testified that Merchant commented that Wehrle's interpretation of the contract denying coverage to part-time employees working less than 17-1/2 hours per week was correct;[52] that these employees did not have to be in the Union. Also, that he said he could work better with employees one-on-one, without a union. Wanta concedes that Merchant never asked them to get fid of the Union or promised them anything if they did.

According to Merchant, late in the meeting, after discussing other issues, the grievance was discussed. Wanta complained to him that Wehrle's antiunion attitude was the problem in resolving the conflict. Merchant replied that Wehrle's attitude was not the issue. He said that the contract was the issue and that he, like most managers, preferred not having a union to deal with, but that the facility had a union contract and he could deal fairly with the employees.

2. Analysis and conclusions

In my opinion, Merchant's remarks, in these circumstances, do not violate Section 8(a)(1) of the Act. In this case, the Union's chief shop steward was engaged in a discussion of labor problems with the administrator. The

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[52] Respondent subsequently won the grievance.

matter of a grievance that Wanta had filed was raised. During an exchange of views on that grievance, Merchant made the observation that the part-time employees covered by the grievance did not need union representation and that he preferred dealing one-on-one with employees. In the context of the facts disclosed by this record, I cannot conclude that Merchant violated the Act in expressing this sentiment, and I find that the remark did not interfere with the employee rights set out in Section 7 of the Act.

L. *Tomah Care Center Facility, Tomah, Wisconsin*

Statement of the Case

The consolidated complaint issued August 20, 1991, alleges that Respondent, at the Tomah facility, through the director of nursing (DON) of that facility, Wendy Libert, unlawfully threatened employees with disciplinary action if they discussed "short staffing" concerns among themselves within the Respondent's facility.[53] A hearing was held before the administrative law judge on May 20, 1992, in Stevens Point, Wisconsin.

1. Facts

On or about May 23, 1990, the Tomah facility was paid a visit by Carol Kriemelmeyer, representing the board on aging and long term care for the State of Wisconsin. Libert testified that she was told by Kriemelmeyer that the purpose

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[53] The Respondent's answer was amended at the hearing to admit the supervisory status of Wendy Libert as DON at the Tomah facility.

of the visit was to investigate a complaint that had been received to the effect that nurses aides were telling residents, in explaining attending to their needs, that the facility was short staffed. According to Libert and Teresa Fleming, the social worker at the Tomah facility, Kriemelmeyer explained, in conversation with them, that comments about short staffing made to residents, even if they were true and accurate reasons for tardy responses to the residents' needs, could be construed as psychological patient abuse because of the concern it could cause to the resident. Also, that as such, it could be treated as patient-abuse in nursing records maintained by the State of Wisconsin.

According to Libert, she called a meeting of the nursing staff to advise them of Kriemelmeyer's admonitions. The meeting, which is the only matter in issue, was held on May 23, 1990, and attended by about 25 NAs, LPNs, and CNAs. Libert testified that at this meeting she told those assembled that they were not to mention the matter of short staffing in their discussions with the residents or in front of the residents and that to do so could be construed as patient abuse, with such a notation being made on their records maintained by the State.

According to Wendy Winfield, however, a nursing assistant,[54] Libert also told them that that they were not to discuss short staffing among themselves anywhere in the facility and that concerning new employees, it might cause them to feel that they were being overworked and that their morale could be affected. They might feel as if they were being mistreated and quit. Libert denies telling the assembled employees that they could not discuss the matter of short

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[54] Winfield was the only witness called by the General Counsel.

staffing with other employees. Regarding discussions with new employees, she testified only that she remarked that they should be careful about making negative comments to new employees, displaying negative attitudes to new employees about their working conditions because she had received complaints from new employees that they were being discouraged by such negative attitudes. Fleming's testimony generally corroborated Libert. She testified that she could not recall employees being told not to discuss short staffing among themselves, only not to discuss it within earshot of residents and concerning new employees, that Libert only told them that some new employees had complained about being overworked and that new employees should be treated with respect.

2. Analysis and conclusions

Based on the entire record, it appears that the purpose of the meeting with employees on May 23 was to advise them that out of concern for the residents they were not to discuss with, or in the presence of residents, the problem of short staffing and that to do so could be construed as patient abuse resulting in disciplinary action affecting their work records. Whatever the merit of that position, transmitting it to the staff was not unlawful, and indeed no allegation of illegality is made regarding remarks made to or in the presence of residents.

Regarding the allegation of telling employees that they could not discuss the problem of short staffing among themselves, I am not satisfied that the record supports this allegation. The corroborated testimony of Libert and Fleming, which I credit, discloses that short staffing, as a subject for discussion, was prohibiting only in conversations with

residents or when residents could overhear such discussions. Libert denies and Fleming cannot recall any prohibition of such discussion among the employees themselves. In these circumstances, I conclude that the General Counsel has not shown, as alleged in the complaint, that Libert threatened employees with discipline if they discussed short staffing concerns among themselves, and, accordingly, I shall recommend the dismissal of that allegation.

M. Beverly Health Care Center, Glasgow, West Virginia

Statement of the Case

The complaint alleges, with respect to the Glasgow, West Virginia facility that Respondent unlawfully informed employees that they would be discharged for refusing to cross a picket line and for joining a strike. Also, that Respondent promised an employee that written disciplinary warnings would be rescinded if she ceased striking and returned to work, all in violation of Section 8(a)(1) of the Act. Further, that Respondent unlawfully discharged Cathy Lewis in violation of Section 8(a)(3) of the Act. A hearing was held before me on June 3, 1992, in Charleston, West Virginia.

1. Facts

a. *Cathy Lewis: discharge and 8(a)(l) allegation*

By way of background, the United Steelworkers of America, AFL-CIO, CLC (the Union), had been certified for a unit of service and maintenance employees, including NAs, on August 31, 1987. Subsequently, a 2-year contract was

negotiated expiring May 31, 1990.[55] On that day, the unit employees rejected a contract proposal and struck the facility at midnight May 31, 1990.[56]

Cathy Lewis was employed by Respondent on December 1, 1989, and worked as a NA on the day shift (7 a.m. to 3 p.m.). She was a union member, but apart from that, the record does not disclose any special activity by Lewis on behalf of the Union. The undisputed testimony of Ann Blye, DON, was that she was not even aware that Lewis a union member.

On May 31, 1990, Lewis was assigned to a patient group that included a patient named Goldie Crouch. It appears that Crouch was among a group of patients whose needs required them to be fed by a NA and it was Lewis' responsibility to feed her. On May 31 Crouch's breakfast was returned untouched to the kitchen. This made it necessary for one of the LPNs, Terri Schulte, to feed breakfast to Crouch. While this was going on, about 10 a.m., Lewis came into Crouch's room, saw Schulte feeding her, and then left.

Near the end of her shift, about 3 p.m., Lewis was called by Ann Blye, DON, to come to her office and, in conformity with company policy, to bring a witness with her. Lewis selected Deneen Hardy as a witness and went to Blye's office. In addition to Blye, LPNs Mary Steele and Schulte were present. At this meeting, Lewis was given two disciplinary memoranda. The first provided for a 5-day

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[55] All dates refer to 1990 unless otherwise indicated.

[56] The contract contained a union-security provision requiting all unit employees to become union members after 90 days of employment; dues to be checked off for those who voluntarily provide dues checkoff authorizations.

suspension citing "Patient Neglect," describing it as "Major Violation # 1." This memorandum recites Lewis' failure to feed Crouch as set out on the assignment sheet. That assignment sheet has reflected that Lewis was assigned to feed Crouch breakfast, but Lewis argued that when she saw the assignment sheet at 7:15 a.m., Crouch was not on the sheet to be fed. Hardy supported Lewis' statement that Crouch was not on the original assignment sheet.

A second disciplinary memorandum was given to Lewis at this same meeting for falsifying Crouch's "Activities of Daily Living Flow chart" (ADL).[57] It appears that nurses aides are required to maintain for each of their assigned patients and ADL reciting the percentage of each meal consumed. Lewis had listed on the ADL 100 percent for Crouch at breakfast. Blye testified that she had been informed that while Lewis did come into Crouch's room while Schulte was feeding her, that the food was only half gone at that time, and that Lewis could not have known what percentage Crouch had consumed. Nevertheless, she falsely listed 100 percent on the ADL. The second memo further states that "Discharge' was the action taken, but also recites as an "Addendum," signed by Blye and Lewis, that "[t]his matter will be investigated further and employee notified of the outcome on *6/1/90.*" Blye testified that while looking into this matter, she became aware of four prior disciplinary memoranda issued to Lewis reciting failure to clean patients after bowel movements, failure to apply proper restraints to a patient, failure to feed a patient, and then charting the patient at 100

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[57] The second memo was prepared and based on events occurring after the first memo.

percent consumption, and taking lunch later than the assigned time.[58]

Lewis testified that after she left Blye's office, she went to the union hall where she participated in the vote rejecting the contract.

Despite the representations in the May 31 memo, no one called Lewis on June 1. Lewis testified that after repeated attempts, she spoke to Blye by telephone on June 6, and asked about the decision. According to Lewis, Blye told her that she could not discuss the matter on the phone because of the strike, but that if she were willing to cross the picket line and come to work, she would destroy the warnings previously issued. Lewis replied that she could not do that, but said she would get back to Blye. However, she never did. Blye testified that she cannot recall speaking to Lewis after May 31, denied ever telling Lewis at any time that the discipline would be dropped if she crossed the picket line.

Thereafter, Blye sent Lewis a letter dated June 6 and received by Lewis June 13, reading:

> As dictated by Beverly Enterprises Employee hand book for violations of a major natura [sic] and so stated in your corrective action you are hereby discharged.

b. *The 8(a)(1) allegations (Georgia Smith and Saundra Wolfe)*

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[58] Lewis did not file grievances for any of these four disciplinary actions, nor did she file any grievance over the disciplinary action imposed on May 31.

Smith was a part-time dietary aide who normally worked from 4 to 8 p.m. Her immediate supervisor was Mary Dailey, dietary manager. On April 13 Smith injured her back on the job and was unable to work until June. At that time Smith called Dailey to tell her that she would be able to return to work. Dailey told her she could come back full-time if she wanted to because they were hiring full-time employees due to the strike. According to Smith, Dailey told her that she wouldn't cross the picket and Dailey said, "she guessed that I knew what that meant." Smith responded, "It means ! don't have a job." Dailey said, "Yes" and "I'm sorry."

Dailey recalls a conversation with Smith concerning her injury but denies telling her that she had no job at the facility. Having reviewed the relevant testimony, I am satisfied that Smith was the more credible witness, particularly because Daily conceded difficulty in remembering the conversation.

Wolfe was also a dietary aide supervised by Dailey. Wolfe testified that on May 15, she broke her arm in a nonwork related accident. As instructed, she called Dailey weekly to advise on her progress. On June 5 Wolfe was issued a written release form by her doctor to return to work on June 18, which she mailed to Dailey. On or about June 12 she called Dailey who verified the receipt of the release form. Dailey asked if she was coming back to work and Wolfe said that she was not coming back until the strike was over. According to Wolfe, Dailey also said that they would probably have to call it "voluntarily dismissed" and that what the facility needed was "to get people up there who cares." Dailey testified that she did have a conversation with Wolfe about her injury and her return to work, but that the conversation took place before the strike. Dailey also denied telling Wolfe that she would be treated as a voluntarily

dismissed or that the facility needed people who care. Despite her denials, however, I conclude, based on a review of the record, that the conversation took place after the strike began and that Daily did make the remarks attributed to her by Wolfe.

2. Analysis and conclusions

a. *Cathy Lewis--discharge and 8(a)(1) allegation*

The record discloses that Lewis was an unsatisfactory employee and that the two disciplinary memoranda issued to her on May 31 were warranted by her misconduct. The disciplinary action being taken against her at that time was lawful and not motivated by her activity in support of the Union.[59] It is also true, as the General Counsel concedes, that, had it not been for the strike, it is likely that she would have been lawfully discharged for employee misconduct. Although the Respondent contends that Lewis was discharged on May 31, however, the record does not support the contention that she was discharged at that time. As of the time the strike began, she had only been suspended. As the second disciplinary memo of May 31 states, the matter was still subject to further investigation with Lewis to be notified on June I of the "outcome." She was not notified on June 1 that she had been discharged and still had not been notified of her discharge at the time she spoke to Blye during the first days of the picketing. She was not discharged until she received the Respondent's June 6 letter on June 13. It seems clear that if

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[59] Lewis was no more active or vocal in her support of the Union or the strike than any other employee.

she had already been discharged, that letter would have been unnecessary.

Although Blye cannot remember speaking to Lewis after May 31, having reviewed all of the relevant testimony, I am satisfied that she did speak to Lewis and that Lewis' account of that conversation is substantially correct and that Blye did offer to "drop" the disciplinary warnings if Lewis would cross the picket and come to work.

First, in agreement with the General Counsel, I conclude that Blye's remarks to Lewis violated Section 8(a)(1) of the Act. Essentially, Blye was promising a benefit to Lewis (dropping the disciplinary actions) if Lewis would agree to refrain from exercising her Section 7 right to assist the Union and support the strike and, instead, to cross the picket line and come to work. Lewis declined and was discharged on June 13, when she received a certified letter discharging her.

In these circumstances, I conclude that had it not been for Lewis' decision to participate in the strike and not to cross the picket line, she would have remained in Respondent's employ. It was because she determined to exercise that right, that she was subsequently discharged in violation of Section 8(a)(3) of the Act, and this is true despite the fact that she probably would have discharged except for the strike.

b. *The 8(a)(1) allegations (Smith and Wolfe)*

It is clear that Wolfe and Smith were economic strikers at the time of the alleged violations. As such, they were entitled to retain employee status unless and until they were permanently replaced. It is unlawful to discharge striking employees while they retain their status as economic strikers. Obviously, any threat to discharge economic strikers for

refusing to cross a picket line constitutes unlawful interference with the Section 7 rights of employees guaranteed in the Act.

First, as to Smith, having concluding that Dailey did make the statements attributed to her, I further conclude that the remarks were coercive. Smith was entitled to exercise her Section 7 right to participate in a lawful strike against the Respondent. This was the exercise of a lawful employee right under Section 7 of the Act, and Dailey's remarks were unlawfully coercive because any reasonable construction of Dailey's statements lead to the conclusion that Dailey was telling Smith that by participating in strike activity, she was causing her own dismissal.

Concerning Wolfe, having reviewed the relevant credible testimony, I am persuaded that Dailey, in her conversation with Wolfe, described her status as "voluntary dismissed." The natural interpretation of such a statement is that Wolfe, by her refusal to cross the picket line, was being discharged by her own action. To convey such threat of discrimination to an economic striker for failing to cross a picket line constitutes unlawful interference with those employee rights, including the right to lawfully strike, protected by Section 7 of the Act.

N. *Richland Manor Facility, Johnstown, Pennsylvania*

Statement of the Case

The complaint, as amended at the hearing,[60] alleges that the Respondent at its Richland Manor facility in Johnstown, Pennsylvania, violated Section 8(a)(1) and (4) of the Act by refusing to pay registered nurse employees a scheduled wage increase, denied registered nurse employees the use of established internal complaint procedures to file a grievance, and conditioned payment of the registered nurse wage increase on a withdrawal of unfair labor practices filed by District 1199, National Union of Hospital and Health Care Employees, S.E.I.U., AFL-CIO (the Union).

1. Facts

a. *Background*

A representation petition for a unit of registered nurses at the Respondent's Richland Manor facility was filed on October 2, 1990. A hearing was held on October 18, 1990, to determine, inter alia, the status of the registered nurses as either employees or supervisors. One of the registered nurses at the facility, Dolores Keiper, testified at that hearing. Thereafter, the Director for Region 6 concluded that the registered nurses were employees within the meaning of the Act and directed an election to be held in a unit of registered

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[60] As discussed herein in greater detail, on July 29, 1992, the Board's certification of a unit consisting of registered nurses at the facility was reversed by the U.S. Circuit Court of Appeals for the Eighth Circuit. The court concluded that the registered nurses were supervisors rather than employees under the Act. Accordingly, those 8(a)(3) and (5) allegations of the consolidated complaint dependent on the certification for their vitality were deleted from the complaint, leaving only the 8(a)(4) allegations for resolution herein.

nurses. The election was held on December 14, 1990. The unit was certified on December 24, 1990. The unit consisted of all full-time and regular part-time registered nurses at the Johnstown facility. Respondent opposed the certification on the grounds that the registered nurses were supervisors within the meaning of the Act and, therefore, declined to bargain with the Union for that unit for the purpose of testing the certification. Unfair labor practice charges alleging refusal to bargain for the unit were filed with Region 6 on February 5, 1991, by the Union. A complaint issued, later upheld by the Board, which ordered the Respondent to bargain with the Union for the RN unit.[61] An appeal from the Board's decision was taken by Respondent to the Sixth U.S. Circuit Court of Appeals. By decision dated July 29, 1992, the Sixth Circuit concluded that the registered nurses were supervisors, not employees, and that the unit therefore was not appropriate and, inter alia, denied enforcement of the Board's Order. *Beverly Enterprises v. NLRB,* 970 F.2d 1548 (6th Cir. 1992).

b. *Wage increase*

It appears that a wage increase of 75 cents per hour was budgeted by Administrator John Poltrack for the registered nurses scheduled to go into effect in January 1991. It is not disputed that the increase was not granted at that time. Poltrack and Wayne Chapman, regional director for human resources, Region 1, testified that as soon as the registered nurses' election on December 14, 1990, was over, they discussed the matter of a wage increase for RN unit employees and decided at that time that it was something that should be

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[61] *Beverly Enterprises,* 303 NLRB No. 20 (May 28, 1991) (not reported in Board volumes).

bargained with the Union in upcoming negotiations, rather than being implemented by Respondent in January. According to Chapman, however, a decision was made thereafter, in late January or early February, that rather than bargain with the Union for the registered nurses' unit the Respondent would refuse to bargain, thus inviting unfair labor practice charges for refusing to bargain, so as to test the unit certification in the Sixth U.S. Circuit Court of Appeals. All the previously scheduled negotiating sessions were cancelled.

Chapman further testified, with respect to the wage increase, that after having decided to test the certification, he felt that if he granted a wage increase, it could have been perceived by the Union as an unlawful unilateral wage increase subjecting Respondent to unfair labor practice charges. On the other hand, if he went to the Union to seek their approval, this would have been tantamount to conceding the propriety of the RN unit at a time when that issue was being litigated.

As time went on, the frustration among the RNs at having been denied a wage increase mounted, and problems of recruitment and retention grew, causing Respondent to reconsider. In June 1990, at a meeting between John August, president of the Union, and various representatives of Respondent, the Union agreed that previously budgeted raises could be given to the registered nurses and that it would not file unfair labor practices over the matter. It is undisputed that in July 1991, raises of 75 cents per hour were granted in July to the registered nurses, retroactive to January 1, 1991.

c. *Refusal to process Keiper's complaint*

As noted above, Keiper testified on behalf of the Union at the representation case hearing on October 18, 1990.

Thereafter, on December 20, 1990, a 2-day suspension was imposed on Keiper, and she returned to work on December 24, 1990. An unfair labor practice charge based on the suspension was filed on Keiper's behalf by the Union on December 31, 1990.

Although the Union had been certified, no contract had yet been negotiated, so when Eileen Connelly, union vice president, was contacted by Margaret Pynkala, union delegate for a service and maintenance unit represented by the Union, Connelly advised her to file a complaint under the "Problem-Solving Procedures" set out in the associates' handbook. That procedure reads as follows:

> Problem-Solving Procedures
>
> Our company maintains an open door policy. We believe that problems between an associate and the company can be worked out through an honest, frank discussion in an atmosphere of trust, respect and cooperation. You may at some time be concerned about your work schedule, personnel policies, or treatment or discipline that seems unfair or unjust to you. To encourage a frank discussion of your problem, the company has set up the following problem-solving procedures. You have the fight to use the problem resolution procedure with the expectation of privacy and without fear of retaliation.
>
> 1. Talk to your supervisor about the problem. Give him or her a chance to resolve it.

2. If you are not satisfied with the results of this discussion, you may take your problem to the administrator.

3. If the administrator does not resolve the problem, contact the Area Manager.

4. If you are still dissatisfied, you should contact the Human Resources Department in your regional office. Your problem will be studied carefully and a timely response will be made.

If you still feel you have not received fair treatment, and cannot resolve the problem through these channels, you may refer to the poster in your facility and call the Beverly Enterprises Hot Line.

On January 3, 1991, a group of employees signed and delivered to Poltrack a petition requesting a review of Keiper's suspension to reduce it to a verbal warning.

On January 11 a meeting was held between Poltrack, Pynkala, and several other employees to deal with work related problems. The petition for Keiper was discussed. According to Pynkala, Poltrack told them that as long as the NLRB had the case, he was not going to answer the grievance because the matter was being handled by the NLRB.

Poltrack testified that he did not say that he would not process grievances under the procedures of the employee handbook, but only that this was not a matter for the Union to deal with because they had no union contract covering the RNs at that time.

Later, a "PETITION" was drafted, listing some 37 issues of concerns to employees at the facility. It was signed by some 58 employees, including Keiper. The first item was

for a "Meeting on Dolores Keiper's grievance." At a meeting held on February 11, attended by about 20 employees, Poltrack was given the "PETITION." Connelly requested a meeting on the Keiper issue. According to Connelly, Poltrack declined, saying there was no procedure for such a meeting. Connelly referred to the handbook procedure, set out above, but Poltrack continued to maintain that there would be no meeting on this matter.

Connelly also sent a letter dated February 12 to Chapman, complaining about employee concerns at the facility and enclosing a copy of the "PETITION" submitted to Poltrack.

Poltrack, in his testimony, admits that he received the petition dated January 3 but did not respond to it because the "Problem-Solving Procedures" described in the handbook applied only to individual employees seeking to avail themselves personally of those procedures and that Keiper herself had not contacted the appropriate management staff to resolve the problem.

Poltrack testified as to this February II meeting that he took the position that the only procedure available to Keiper, as there was no union contract grievance procedure available to her, was under the terms of the "Problem-Solving Procedures" of the employee handbook that required her, individually, to avail herself of those procedures, which she had not done.[62] Similarly, Chapman testified that he did not nothing about the February 12 correspondence sent to him, because, like Poltrack, he felt that those procedures were

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[62] Keiper concedes that she did not raise the matter with management officials, nor did she attend the meetings of January 11 and February 11.

available only to the employees themselves, not to the Union or others seeking to invoke the procedures on her behalf.

d. *Conditioning wage increase on withdrawal of unfair labor practice charges*

Keiper and another registered nurse, Lorraine Luert, testified that on May 1, 1991, a meeting of the RNs was conducted by Poltrack at the facility. The primary topic was the RNs' dissatisfaction at having been denied the pay increase in January. According to Keiper, the RNs were told by Poltrack that he had just gotten off the telephone with Chapman and could tell them that if they were to drop the charges filed with the NLRB, they would be given the raises due the prior January. Delores Kimble, another registered nurse at the meeting, testified that Poltrack told them that he had been on the telephone with Chapman and that if they got a letter from the Union dropping the charges, they would get their raise.

Poltrack testified with respect to this meeting that he did not tell the registered nurses that the raise would be granted if the unfair labor practice charges were withdrawn. According to Poltrack, he had spoken to Chapman about the problem and Chapman had expressed concern that if the raises were given, it would subject the Respondent to unfair labor practice charges for having taken unilateral action on a matter that should have been negotiated with the Union. Chapman confirmed conversations voicing these concerns to Poltrack, but that he did not ask Poltrack to solicit the withdrawal of any unfair labor practice charges in exchange for granting the wage increase.

A contemporaneous internal corporate memo dated April 29, 1991, however, from Chapman (G.C. Exh. 67)

discloses, as Respondent concedes in its brief, that Chapman asked Poltrack to meet with the RNs. "I asked the Administrator to meet with the RNs (scheduled this week) and tell them to have the Union write to the Board requesting withdrawal of the unfair labor practice. If the Union agreed, we would proceed with a raise for the RNs." I conclude that this memo comports with the recollection of the General Counsel's witnesses and that Poltrack, despite his denials, did in fact, suggest to the RNs at a meeting on May 1, 1991, that they withdraw the pending unfair labor practice charge, and after having done so, a raise would be granted.

2. Analysis and discussion

a. Coverage of supervisors under Section 8(a)(4)

Section 8(a)(4) of the Act reads:

> It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

There is a division of authority between the Board and some U.S. Circuit Courts of Appeal on the issue of whether or not supervisors are protected under Section 8(a)(4) of the Act. In *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), the Board concluded that a supervisor discharged because of his threat to file charges against his employer with the Board was entitled to relief on the theory that the right of access to the procedures of the Board should be protected and extended even to supervisory employees. The U.S. Court of Appeals in

Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910 (3d Cir. 1981), denied enforcement concluding that once supervisory status has been conceded, the case must be dismissed because the Board has no jurisdiction to decide the case on its merit. In *General Services,* 229 NLRB 940 (1977), enf. denied 575 F.2d 298 (5th Cir. 1978), the court reached the same conclusion.

The Board has long held that it will exercise jurisdiction over supervisors when the employer's discrimination has a coercive effect on statutory employers in the exercise of their rights under the Act. See *Florida Power & Light Co. v. Electrical Workers,* 417 U.S. 790, 803-805 (1974).

I am constrained to follow existing Board precedent, and I conclude the RNs, although defined by the Third Circuit as supervisors, as set out above, are nonetheless entitled to coverage under Section 8(a)(4) of the Act and the 8(a)(4) allegations must be decided on their merits.

b. *The wage increase*

The probative evidence satisfies me that Respondent had budgeted a wage increase of 75 cents per hour for January of 1991 and that the wage increase was not granted at that time. The position of the General Counsel is that Respondent discriminated against the RNs by withholding the wage increase because, as set out in the complaint, "charges were filed and testimony given to the Board." I do not agree. In my opinion, this allegation has not been established.

Respondent chose not to grant the wage increase in January, at first because it wanted any wage increases to be negotiated with the Union and later, after having decided to test the certification, because it did not want to risk refusal to

bargain charges by granting wage increases unilaterally. Further, Respondent felt that by conferring with the Union and then granting the wage increase with its approval, that would be tantamount to granting recognition to the Union at a time when it was contesting the propriety of the bargaining unit. Based on a review of relevant testimony, I conclude that these were the reasons that Respondent did not grant the wage increase.

Moreover, the record is totally insufficient to support the contention that the wage increase was withheld because of the unfair labor practices filed by the Union. This argument requires assumptions I am not willing to make. The record itself discloses no causal relationship between the filing of the unfair labor practices and withholding the wage increase.

In short, I conclude that the evidence does not support the conclusion that a wage increase was withheld on January 1 either because the unfair labor practices were filed by the Union or because Keiper or other employees had given testimony at a representation case hearing in October 1990.

c. *Refusal to process Keiper's complaint*

The General Counsel alleges that Respondent discriminated against Keiper by denying her the use of the internal complaint procedures of the handbook to file a grievance because Keiper gave representation case testimony on October 18, 1990, or because the Union filed unfair labor practice charges on December 31 and February 6.

Respondent concedes that it did not process Keiper's suspension under the procedures set out in the employee handbook and did not accede to requests to do so made on her behalf. In so doing, Respondent's takes the position that the "Problem-Solving Procedures" of the employee handbook

must, by its terms, be utilized by the individual employee and not by others on her behalf. It is not disputed that Keiper herself made no attempts to resolve the problem herself under the employee handbook procedures.

The General Counsel points to testimony to the effect that Poltrack, on January 11, stated that because the NLRB was handling the matter as an unfair labor practice charge, he was not going to respond to the petition. Although I credit the General Counsel's witnesses in this regard, I conclude that this remark was essentially superfluous because the handbook, by its terms, requires Keiper herself to utilize the procedures contained therein, and admittedly she made no effort to do that.

Accordingly, I find that despite the statement by Poltrack, the record is insufficient to support the conclusion that Respondent discriminated in denying Keiper the use of established internal complaint procedures because she either filed an unfair labor practice charge or had given testimony to the Board.

d. *Conditioning wage increase to RNs on the withdrawal of unfair labor practices by the Union*

As noted above, Poltrack did on May 1, at Chapman's request, hold a meeting of RNs when they were told to have the Union write to the Board requesting withdrawal of the unfair labor practices in order to get the wage increase. The apparent motive for this concession was the practical problems and dissatisfaction that continuing to withhold any wage increase was creating at the facility in the RN group. Thereafter, as noted above, the parties met in June and a wage increase for the RNs of 75 cents per hour was put into effect July 6 retroactive to January 1. In these circumstances,

although Poltrack's remarks to the RNs on May 1 would have been strong evidence of unlawful motivation in the event the wage increase were denied, the record discloses that the increase, after discussion with the Union, was not withheld, but granted with retroactivity to January 1, all without any withdrawal of the unfair labor practice charge.

In these circumstance, I cannot conclude that Respondent discriminated against the RNs by conditioning a wage increase on the withdrawal of unfair labor practice charges on May 1.

O. *Wyoming Valley Health Care Facility, Wilkes-Barre, Pennsylvania*

Statement of the Case

The complaint alleges, with respect to the Wyoming Valley Health Care vacility in Wilkes-Barre, Pennsylvania, that Respondent violated Section 8(a)(1) by threatening an employee, Christopher Tausch, that he was being terminated for having copied a list of phone numbers of Respondent's employees and Section 8(a)(3) in that the same employee, Christopher Tausch, was discharged for having engaged in union activity.

1. Facts

Tausch is a 1990 graduate of Rutgers University with a scholastic concentration in labor studies. He was hired by the Union on January 14, 1991, as a "colonizer." Tausch described a "colonizer" as a paid union employee assigned to seek employment with an employer for the purpose of organizing from the inside. As a "colonizer," he was paid a

salary of $150 a week by the Union plus whatever he earned from his employment with the "target" employer. It was as a "colonizer" that Tausch sought employment and was hired as a NA at the Wyoming Valley facility on January 24, 1991.[63] He worked as a NA on the 3 to 11 p.m shift on the east wing. Tausch did not disclose his union identity to the Respondent and lied about his level of education on his employment application. Tausch testified that it was his intention, once employed, to obtain the names, addresses, and telephone numbers of employees for the purpose of soliciting them in an organizing effort on behalf of the Union. He used telephone books, name tags, and whatever other sources may have been available to obtain this information. Tausch was admittedly engaged in a clandestine activity for the limited purpose of organizing that facility and concedes that his employment with the Respondent would therefore have been temporary.

On the evening of March 27, during a work break about 7 p.m., Tausch went into the kitchen area of the dietary department. His purpose was to promote organizational interest among the dietary department employees. He sought out and located a dietary employee named Charles Weitz just inside the door to the kitchen area and engaged Weitz in a discussion about union representation. Tausch also asked Weitz for the names and addresses of two other dietary department employees and Weitz told him that those telephone numbers were on a list located in the office of the dietary department manager, Richard Rutkowski, who was not on the premises at the time, having been called home to attend to his pregnant wife. Tausch went to the room with Weitz where Tausch, sitting at Rutkowski's desk, copied from a list taped

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[63] All dates refer to 1991 unless otherwise indicated.

to the wall beside the desk, the names and telephone numbers of the people he wanted to solicit from a listing of the 20 or so dietary department employees. Thereafter, he returned to his nursing assistant duties on the east wing.

Tausch testified that although he was gathering information throughout his employment, he did not discuss the Union with anyone until March 26, 27, and 28 when he visited, along with a female union organizer named Vandallia Leventry, some 20 employees to solicit their support.

Later in the evening Rutkowski returned. Rutkowski testified that Weitz told him that a nurse had been in his office and had taken down telephone numbers from a listing of the dietary department employees. Rutkowski thought it might have been nurse trying to contact him with a problem and so he went to the charge nurse, but she was unaware of any visit.

On the morning of March 28, shortly after 10 a.m., Tausch and Leventry visited Weitz at his house where they solicited him to support the Union and to interest other employees in their organizational efforts. Weitz gave them short shrift, telling them that he was not interested and that he had to get to work. Weitz arrived at the facility about 11:45 a.m. and sought out Rutkowski to complain to him about Tausch's visit. He identified Tausch as the nurse who had visited Rutkowski's office the previous night. Weitz complained that Tausch was bothering him by visiting him at home about joining and promoting a union and went over again with Rutkowski the events of the previous night.

Rutkowski then sought out his supervisor, Nancy Wilson, dietary consultant, telling her what he had been told by Weitz. Thereafter, Wilson gave the information to Deborah Josephite, the acting assistant administrator, who, at about noon, called Donna Connery, the administrator. She told Connery that she had been told by Rutkowski that on the

previous night Tausch had entered the dietary department area, speaking to Weitz about his interest in obtaining union representation and also had gone into the dietary department manager's office where he took down the names of employees and removed them from the facility. She also told Connery about Weitz's agitation over the visit by Tausch and Leventry to his house. Connery asked Josephite to write out what she had been told about the incident. Connery returned to the facility about 12:30 p.m.

When she arrived, she spoke to Josephite and received from Josephite a statement, signed by Josephite, reciting what Weitz had told her about the incident. Connery spoke to Rutkowski who reviewed with her the events of the prior evening and also told her that Weitz was upset over Tausch's visit that morning.

After this, Connery made a decision to terminate Tausch for unauthorized entering the restricted dietary department area and removing confidential employee information from the facility. She instructed Josephite to write out an "Employee Memorandum" terminating Tausch. In relevant part, the memorandum reads: "Unauthorized possession or removal of employee phone numbers. Divulging employee-company confidential information." Thereafter followed a description of the incident:

> Chris entered the kitchen area and subsequently the dietary service manager's office--unauthorized. He wrote employee confidential information on a paper and removed information from the facility. Chris divulged employee information to an outside source--unauthorized.

Because the incident also involved union activity, Connery felt it necessary to call Wayne Chapman, regional director for human resources, to advise him of her decision, She did this sometime prior to Tausch's termination later in the day. Chapman concurred in the decision to terminate Tausch.

Later in the afternoon after Tausch had reported to work, he was called into Connery's office. Also present were Marion Swancki, DON, and Josephite. Connery gave him the discharge memo previously prepared by Josephite. Tausch explained that he had gone to the dietary area to speak with Weitz but did not explain his purpose in doing so. Tausch also admitted that he was in the dietary department office and that he took down telephone numbers but said that those were telephone numbers of friends. Tausch refused to sign for the receipt of the discharge memorandum. The discharge interview terminated and Tausch left the premises.

Connery testified that the kitchen area was restricted to dietary department employees and was off limits to others and that Tausch's visit violated company policy in that regard. The evidence discloses the kitchen area was posted against entry by nondietary department employees.[64] Further, there is a provision in the dietary department manual limiting access by nondietary department employees without express authorization of the administrator or dietary service manager.[65] Tausch concedes that he was aware of the

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[64] It read, "Dietary Personnel Only."

[65] The provision reads:

POLICY

No one is allowed in the Dietary Department without the express authorization of the

posting, it appears that nondietary department employees observed these restrictions and went into the kitchen area only occasionally to pick up meal trays from a rack just inside the dietary department door and sometimes, infrequently, when authorized by dietary department employees to get missing items of food, drink, or utensils for food trays being brought to residents.

Connery testified that the reason for restricting the dietary area to employees of the dietary department was to reduce the possibility of cross-contamination by nursing personnel coming into the kitchen area after contact with sick residents. The matter of cross-contamination was also the subject of regulation by both state and Federal governments.

Connery testified that it was not entering the dietary area alone that caused her to discharge Tausch, and that he would not have been discharged for that infraction alone. More serious, as set out in the discharge memorandum was the "unauthorized possession or removal of employee phone numbers. Divulging employee-company confidential information." Connery testified that the home telephone numbers of employees are confidential information, and that

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Administrator of the Dietary Service Manager, except for Dietary employees and the Administrator.

PROCEDURES

1. "Dietary Employees Only" signs should be posted on all entrances to the Dietary Department.
2. All unauthorized persons are to be discouraged from entering the Dietary Services Departments.
3. The Dietary Service Manager or designee will be responsible for enforcing the requirement.

taking down these telephone numbers, removing them from the premises, and disclosing them to outside sources[66] was a violation of company policy that justified summary dismissal, particularly as Tausch was a probationary employee, not entitled to the progressive discipline procedures employees normally received.

In support of the contention that Tausch's actions in copying and removing employee telephone numbers violated company policy, Connery alluded to a provision in the employee handbook captioned "Non-Disclosure of Information,'' which reads:

> Non-Disclosure of Information
>
> We need your cooperation to keep our company business within the company. Please read and support the following statement: Beverly associates shall not--either directly-divulge, disclose, or communicate to any person, firm or corporation (other than is required by law), information affecting or relating to residents or their records, other associates, or the business of the company, such as the company's manner of operation, plans, manuals, etc.

In the "Employee Conduct and Rules" document at this facility, there is listed as major violations the following: "10. Divulging employee, resident, or company confidential

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[66] Tausch was himself an "outside source," as a paid union organizer.

information." It does not appear that employee telephone numbers were specifically defined as confidential information.

2. Discussion and analysis

a. *Tausch's discharge*

It is necessary first to resolve the issue whether or not Tausch, admittedly a paid union organizer, is also an employee of the Respondent entitled to the protection of the Act. The record discloses that Tausch, a college graduate, lied about his education and was hired as a nursing assistant. He was paid $150 per week by the Union while so engaged, and allowed to keep his salary from the facility. Tausch testified that a career in a health care industry was not his ambition, and that his employment would have been limited in duration to the union organizational effort. He testified that he would return to work if he were reinstated and make another effort to organize the Respondent's employees. Despite the split between certain U.S. Circuit Courts of Appeals and the Board, it appears that the Board maintains the position that an individual does not lose his status as an employee because he is, at the same time, on the payroll of the Union attempting to organize his employer.[67] Thus the Board having spoken, I am constrained to follow that precedent and, accordingly, I conclude that Tausch was an employee within the meaning and protection of the Act.

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[67] *Sunland Construction Co.*, 309 NLRB 1224 (1992). *Town & Country Electric*, 309 NLRB 1250 (1992). These cases include a full analysis of the issue that will not be reexamined herein.

Respondent disagrees, acknowledges the above-cited Board precedent, but contends that an exception to this rule exists when there is "objective evidence" that union organizer employees will engage in activities "inimical" to the employer's "operations." The Board appears to recognize such an exception. *Sunland Construction Co.*, supra at 1230. In the instant case, however, the record does not disclose the existence of such objective evidence so as to warrant the inference that Tausch forfeited employee status prior to his employment by Respondent.

There remains for consideration whether or not Tausch was discharged for having engaged in union activity. Respondent contends that by copying, removing, and divulging employee telephone numbers, Tausch violated company rules and policies and that his discharge was justified. The General Counsel concedes that Tausch did these things, but argues that the rationale presented by Respondent was nonetheless a pretext and that Tausch's discharge was discriminatory.

A review of the record discloses that Tausch, on being hired, set about the work for which he had been sent by the Union, i.e., compiling information on the employees to enhance communications with them with a view towards organizing. In an effort to obtain telephone numbers for dietary department employees, he went into the kitchen area and then into the office of the dietary department manager where he copied employee telephone numbers from a list on the wall beside the manager's desk. In my opinion, Tausch's activity, while clearly union activity on behalf of his union-employer, was not protected and his discharge did not violate Section 8(a)(3) of the Act.

First, the dietary department was a restricted area. Provisions in the dietary department manual make it off limits

except to dietary department employees, and it was posted against access by other than dietary department personnel. Tausch concedes that he was aware that it was so posted. The rationale for the rule is valid, to avoid contamination of the kitchen area from others such as nurses aides, whose duties bring them into close physical contact with sick patients.[68]

Not only did Tausch go into the dietary department area without authorization, he went into the office of the dietary department manager and took down employee telephone numbers for use in the organizational effort. The record discloses that such information is treated by Respondent as confidential. Despite the fact that there are no specific policy statements or rules specifically defining employee telephone numbers as confidential, there do exist written statements of policy, set out above, which, in my opinion, make it clear that telephone numbers fall into a classification of confidential.

In applying the *Wright Line*[69] test of causation, I conclude that this record discloses that Tausch was actively seeking to organize employees at the facility. The General Counsel has made a showing sufficient to support an inference that Tausch's union activity was a motivating factor in Respondent's decision to discharge him. I further conclude, however, that because of Tausch's misconduct, set out above, he would have been discharged even had he not been so engaged. Accordingly, I shall recommend that this allegation be dismissed.

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[68] Although the record also discloses occasional limited entry by others, this in no way legitimizes Tausch's visit.

[69] 251 NLRB 1083 (1980), 462 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

b. *The 8(a)(l) allegation--informing Tausch in his discharge memo that he was being discharged for engaging in protected concerted activity*

I have concluded, essentially, that discharging Tausch for the reasons set out in the discharge memo was not unlawful. So advising him in the discharge memo does not violate Section 8(a)(l) of the Act.

P. *Sanger Hospital Facility in Sanger, California*

Statement of the Case

The complaint alleges, with respect to the the Sanger Hospital facility in Sanger, California, that Respondent violated Section 8(a)(l) of the Act by coercing and threatening an employee, Rudy Garza.[70]

1. Facts

Housekeeping department employee Rudy Garza testified that on June 18, 1991, about 2:30 p.m., Tony Velasquez, housekeeping supervisor, called him and housekeeping department employee Isaac Navarro into the laundry room where he spoke to them concerning the presence

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[70] The complaint also alleges 8(a)(1) unlawful interrogation by Respondent's attorney on May 23, 1991. The General Counsel, in its brief, however, after evaluating the record, concluded that no violation had occurred and, in its brief, withdrew that allegation. Accordingly, that allegation is hereby dismissed.

at the facility of Union Representative Mike Guidry.[71] He said that Guidry would be seeing them one by one about signing a union paper. He said that they were free to either sign it or not at their option, but that he did not want them to get hurt.

About one-half hour later, according to Garza, he spoke to Velasquez again on the B wing. Velasquez told him that he did not want him to get "hurt" and advised him not to sign the union papers. Velasquez testified that he has no specific recollection of speaking to Garza concerning union papers but that he did speak to some employees, telling them that he did not want them "hurting for money," and that they would have to pay union dues out of their pockets. Velasquez testified that he was aware of their need for money as he sometimes arranged overtime to enable employees to meet their financial needs.

2. Discussion and analysis

a. *Threats and coercion by Velasquez*

As noted above, Garza testified that he was told by Velasquez that he did not want him to get hurt and that he should not sign any union papers. Velasquez testified he has no specific recollection of talking to Garza but that he did say to some employees that he did not want them "hurting for money" because they would have to pay union dues out of their pocket. Having reviewed all of the relevant testimony, I am satisfied that Garza's recollection of his conversation with Velasquez is the more credible, and suggests

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[71] Guidry is a field representative for Hospital Health Care Workers' Union, Local 250.

that some unspecified harm would come to Garza that could be avoided if Garza did not sign the union papers.

Employees have the right under Section 7 of the Act to form, join, assist, or otherwise engage in union activity, free from interference by the Employer. Unlike Respondent, I do not regard Velasquez's comments as noncoercive. Although it may have been somewhat vague, the implication of threat was clear, and even if the admonition was offered out of concern, it was nonetheless coercive and unlawful. Velasquez' remarks were essentially a threat of reprisal for engaging in protected activity and, as such, violate Section 8(a)(1) of the Act.

Q. Beverly Manor, San Francisco, California

Statement of the Case

The complaint, as amended at the hearing, alleges, with respect to the Beverly Manor facility in San Francisco, that Respondent, violated Section 8(a)(1) of the Act by interrogating an employee concerning his union sympathies, instructed employees to draft, sign, and circulate a petition to decertify the Union, physically assaulting a union representative and telling an employee that a union business agent would be killed unless he ceased acting for the Union. Further, that Respondent discriminatorily discharged employee Johnny Scott in violation of Section 8(a)(3) of the Act.

1. Facts

Respondents operates the Beverly Manor Convalescent Hospital in San Francisco. The administrator of the facility during the relevant time period was Enid Begay. The DON, hired by Begay, was Rubin Logan, a RN. The parties stipulated that the Union has represented under contract, since at least the early 1970's, a unit of nursing employees, excluding supervisory LPNs and RNs. The relevant contract was effective September 1, 1989, through September I, 1991. Daciano Lamparas and Maria Griffith were the union business agents with responsibility for administering the contract at Beverly Manor.

On May 7, 1991,[72] Scott was hired as a CNA. He had previously worked as a CNA for Beverly at another facility in California for about 3 years in the late 1980s and had maintained his CNA license. Shortly after his hire, he became a restorative aide and worked in that capacity until his termination on June 20, 1991.

Within a few days after his hire, during a 3-day orientation period, he was interviewed by Logan who asked him what his feeling were about the Union, Local 250. Scott responded in a somewhat negative fashion, saying that it was necessary to be in the Union in order to work there and referred to a prior negative experience with the Union. Logan raised the possibility of decertifying the Union. Scott asked what one person could do, Logan asked him if he would be willing to support an employee petition to decertify the Union. Scott's response was equivocal to Logan's inquiry, but in the days following, Logan repeatedly approached him for the purpose of having him and other employees circulate an employee petition to get rid of the Union.

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[72] All dates refer to 1991 unless otherwise indicated

A couple of weeks later on Sunday, May 19, Logan called together Scott and three other male employees. According to Scott, they were all among the last employees hired. Logan told them that he wanted to get rid of Local 250 and suggested that they sign a petition to decertify the Union. He gave them a piece of paper with some writing on it, which Scott testified he did not read, and told them that he wanted them to sign it and also to write out themselves why they wanted the Union out. Logan said that he did not want to be seen at the facility on Sunday and did not want the petition returned to him in his mailbox, but rather wanted it to be slipped under his door.

He then left the four alone in a conference room, ostensibly to do what he had requested. They discussed the matter among themselves, with Scott speaking out in favor of representation by the Union. Apparently, the matter was not given any serious consideration, and they balled up the paper and batted it around. Scott finally tossed it into a wastepaper basket.

Thereafter, Scott told a shop steward about the incident and, on June 18, a charge was filed with the NLRB alleging, inter alia, soliciting employees to sign and circulate a decertification petition. A copy of this charge was served on Respondent the same day by certified mail.

Scott testified that after the Sunday, May 19, incident, Logan was "on his case" all the time, including a written disciplinary report dated June 17, signed by Logan, reciting shortcomings by Scott in his performance of patient care duties.

On June 20, Scott worked the morning shift (7 a.m. to 3:30 p.m.) that was badly shortstaffed. Instead of a normal complement of 8 employees, Scott was assigned to 13 patients, with responsibilities that included the dressing,

feeding, and bathing. About 1:30 p.m., he was called to Logan's office. Logan commenced to berate him for leaving a certain patient wet for too long. Scott attempted to explain that they were short-staffed and that he would attend to it as soon as he finished the patient he was with. Irma Helton, director of staff development, who was also present, supported Scott during this discussion. Logan told Scott that he did not want him on the floor and Scott responded, "Do what you please," and returned to his patients.

Shortly thereafter, he was again called to Logan's office and offered a choice between signing a resignation or discharge. Scott told him to do what he wanted and again left the office. Helton came after him, telling him that he would be well advised to sign the resignation so as to avoid an unfavorable inference when he sought future employment. Scott took the advice, returned to Logan's office, and signed a resignation form, reciting his "voluntary retirement," although he testified that his termination was not voluntary.[73]

On June 7, sometime before 5 p.m., Union Representative Daciano Lamparas went to the facility on union business. First, he met with Arturo Roque, a shop steward at the facility, in the breakroom. They met until about 5 p.m. when Lamparas left the breakroom to go to a meeting with Begay. After Lamparas left, Logan came into the breakroom, approached Roque and said to him in an angry tone of voice, "Tell your friend to stop fucking around me or he's going to get killed." After leaving his meeting with Begay, about 6 p.m., Lamparas went by the reception area and said, "good-bye" to Logan and two other employees who

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[73] Begay testified that she did not participate in the decision to terminate Scott.

were with him. Logan followed him out the door of the facility then began to curse him, saying, "This is a Black neighborhood. I can even kill you." Logan then struck Lamparas on the right side of the face with his briefcase. Logan, still enraged, told Lamparas to leave him alone or he would kill him.[74] After reporting the attack to Begay, Lamparas was driven by Roque to the hospital.

On June 25, Maria Griffith, a union field representative, went to the facility about noon. Pursuant to agreement with the facility, she reported her presence to the receptionist so that Begay would know that she was at the facility. Griffith then proceeded to the lunchroom where she spoke to employees and distributed union bulletins. While she was speaking to employee Tony Donaldson, Logan came in and began to scream obscenities, telling Donaldson that he did not "give a fuck" who Donaldson was talking to, he was "gone." Logan railed against these "fucking union people," calling them "motherfuckers."[75] Logan continued to rage obscenities as he left the lunchroom. In order to calm the situation, Griffith left to locate Logan and found him in the reception area where he was still enraged, cursing, and, according to Griffith, "foaming at the mouth." He spat in her face and attempted to grab her. She ran and Logan followed her into the business office area. Others came to her aid and were attempting to restrain Logan. Once in the business office, Griffith made her way to a telephone behind bars at a

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[74] Logan's assault of Lamparas was not alleged in the complaint.

[75] In May, while visiting the facility, Begay had introduced Griffith to Logan who refused to shake hands, saying he would never shake hands with union people.

service window. Logan was still attempting to grab at her between the bars. She was eventually able to call the police and Logan continued to rage like a mad man. As she attempted to call Charles Ridgewell, director of the union convalescent division, Logan said, "I don't give a fuck who you call. Tell Charlie [Ridgewell] he's going to be killed too."

The police arrived and the incident was reported, but Logan had left before the police arrived, saying that he was quitting. Subsequently, as a result of this incident, even though he had resigned, Logan was discharged by Rod Panyik, Respondent's RDHR for Region 9. A letter of apology was sent to the Union.

2. Discussion and analysis[76]

When Logan interviewed Scott during Scott's orientation, it is clear, based on the credible evidence in the record, that Logan questioned him about his views on union representation by Local 250 and, apparently motivated by what he perceived as antiunion responses, made an effort to recruit Scott to write up, sign, and circulate a decertification petition among the employees. This evidence is not rebutted, I conclude first that the interrogation of Scott in a context of simultaneously soliciting him to circulate a decertification was unlawful in violation of Section 8(a)(l) of the Act.

Also unlawful was Logan's solicitation to have Scott write up, sign, and circulate a decertification petition. Employees themselves are entitled to petition the Board to decertify an incumbent union. Such an employer

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[76] Although Scott's testimony was disjointed and sometimes confusing, it was, in its essentials, credible. Logan did not appear as a witness at the hearing.

decertification effort, however, may not be initiated or assisted by the employer. Logan's involvement in such a way in the decertification process constitutes interference with the right of employees to free choice in the selection and retention of union representation, and violates Section 8(a)(1) of the Act.

In these circumstances, Respondent's contention that the questioning by Logan was noncoercive under the "totality of circumstances" test set forth in *Rossmore House*[77] is without merit.

After May 19, when it became clear that Scott was unwilling to cooperate in the circulation of any decertification petition, Logan became critical of his work and, on June 20, under the circumstances described above, discharged Scott.[78]

The specific issue to be resolved is whether or not Logan's discharge of Scott was discriminatory. I conclude that it was. The record is ample for me to reach the conclusion, as I do, not only that Logan displayed union animus but that he was actually obsessed with ridding the Respondent of Local 250 and, moreover, that this obsession had violent overtones as suggested by the incidents of assault on Union Representatives Lamparas and Griffith, set out below, occurring on June 7 and 25.

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[77] 269 NLRB 1176, 1177 (1984), affg. *Hotel Employees & Restaurant Employees Union v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[78] The fact that Scott signed a resignation form does not persuade me that Scott actually resigned. He was given a choice between discharge, for which papers had already been prepared, and resignation and chose to sign a resignation only to avoid the possibility of poor references when seeking other employment.

There is no doubt in my mind that Scott's reluctance to support Logan in his unlawful effort to get rid of the Union motivated Logan to discharge him. Employees have the right to select and retain union representation and may not be discharged for refusing to participate in an unlawful effort to oust the labor organization they have selected to represent them.

Respondent argues that Scott was an unsatisfactory probationary employee, previously counseled for violating rules involving improper documentation and smoking in the facility.[79] The termination memo recites Scott's failure to care for wet and dirty patients. Although these are justifications offered on Logan's behalf,[80] they are not supported either by Logan himself, as he did not testify, nor by any other probative evidence.

Nor do I conclude, as urged by Respondent, that Scott was insubordinate on June 20. His normal reaction to being harassed and discharged discriminatorily cannot be classified as insubordinate.

In applying the rationale of *Wright Line,* supra, to the instant case, it is clear that the General Counsel has met its burden of making a prima facie showing to support the inference that Scott's refusal to participate in Logan's unlawful effort to initiate a decertification petition was a

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[79] Scott freely admits smoking in the bathroom, one of the masons assigned by Respondent as a factor in his determination. This contention is essentially insignificant, however, and offered as an afterthought, never being previously advanced by Logan as a factor in Scott's termination.

[80] Scott testified that he was not disciplined prior to his discharge and disciplinary memos dated June 12 and 17 were rejected as exhibits as not being authentic.

motivating factor in Respondent's decision to discharge him. I further conclude that Respondent has not met its burden of demonstrating that it would have discharged Scott even had he not refused to participate in the decertification effort. Accordingly, I conclude that Scott was discharged in violation of Section 8(a)(3) of the Act.

With respect to the events of June 7, it appears that Logan not only physically assaulted a union representative, Lamparas, but shortly before that went to the breakroom, where he told employee Shop Steward Roque to tell Lamparas that he was going to get killed if he did not stop "fucking around with him," in circumstances and a context when he was obviously referring to Lamparas' function as a union representative.

In my opinion, a threat to kill a union business agent made by a DON supervisor and conveyed to a shop steward employee is coercive. It has an intimidating effect and interferes with the rights of employees under Section 7 of the Act to form, join, or assist labor organizations free from interference by the Employer.

With respect to Logan's physical assault of Union Business Representative Griffith on June 25, I am satisfied that Logan's behavior was totally unwarranted. For whatever reason, it appears that the concept of unions representing employees generated hostile and violent reactions in Logan. He attempted to do physical harm. He spit and showered her with obscenities in the presence of employees. Despite the fact that apologies were made by the Respondent to the Union, his misconduct on June 25 was inhibiting and coercive to employees. Under Section 7 of the Act, employees have the right to union representation free from interference by the employer. When employees see a union business representative engaged in the business of representing them

physically abused by a DON, this, without more, constitutes interference with the Section 7 rights afforded to employees under the Act.

Respondent, while not attempting to defend or justify Logan's attack on Griffith or threats to kill Lamparas, nonetheless takes the position that the Employer bears no responsibility for these actions because Logan was not acting within the scope of his employment as an agent of the Respondent. This argument is not well taken. Logan was hired by Respondent to supervise arm entire nursing staff. This was an organized facility operating with a union contract. The terms and conditions of the nursing staff's employment were regulated by that contract and Logan was necessarily involved in its administration. Working with a union contract angered Logan, however, and he lashed out against it. He unlawfully solicited Scott to circulate a decertification petition and fired Scott when he would not cooperate. Although the conduct was outrageous, the objectives were not without the scope of his authority as DON. Nor were they contrary to the ultimate interest of the Respondent when, as here, the record discloses that Respondent's corporate policy was to oppose union organization wherever possible. For example, the Respondent's human resources manual sets out a "nonunion environment" as a goal and exhorts the regions to "support the preservation of a non-union environment" and the individual facilities to "preserve a union free environment."[81]

R. *Duke Convalescent Facility, Lancaster, Pennsylvania*

Statement of the Case

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[81] G.C. Exh. 403, labor relations section, p. 1.

The complaint alleges with respect to the Duke Convalescent Facility in Lancaster, Pennsylvania, that Respondent engaged in various misconduct, including threats and interrogation in violation of Section 8(a)(1) of the Act.[82] Also that Respondent violated Section 8(a)(3) of the Act by issuing a written warning, suspending, and discharging employee Amy Johnson, and refusing to permit employee

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[82] Par. I(b) of the complaint was amended at the hearing to admit to the status of Steve Marek as consultant and agent of Respondent within the meaning of Sec. 2(13) of the Act and to correct the spelling of his name. Sec. 2(a) of the complaint was amended to substitute "April" for "early February." Par. 2(d) of the complaint was amended to read:

> In or about February 1991, a more precise date being presently unknown to the General Counsel, (i) acting through Kathleen Sobeck, criticized an employee for bringing up the subject of the Union at a staff meeting and (ii) acting through Jonathan Eigen, told the employee to quit because the employee was a union supporter.

Par. 2(e) of the complaint was amended to mad "During late February and March 1991, acting through Steve Marek, interfered with employees' union activities by stationing himself in the employee breakroom during employees' breaks for the purpose of observing and inhibiting employees' union activities." Par. 2(k) was added to par. 2 of the complaint reading:

> On or about February 1, 1991, a more precise date being presently unknown to the General Counsel, acting through Kathleen Pereira, told employees that they were not permitted to wear union buttons or to have union mugs in the kitchen.

Par. 3(b) of the complaint was amended to read "acting through Jonathan Eigen and Richard Leonard." Par. 3(c) of the complaint was amended to read "acting through Jonathan Eigen and Richard Leonard."

Valerie Faulkner[83] to return to work until she obtained a copy of her job description signed by her physician representing that she was able to perform the duties set out thereon. A hearing on these allegations was held on October 7 and November 12 and 13, all in 1992.

Background

It appears that an effort to organize Respondent's service and maintenance employees was begun about January 1991. A petition for a unit of service and maintenance employees was filed by Pennsylvania Social Services Union, Service Employees International Union, Local 668, AFL-CIO, CLC (the Union or the Charging Party), on February 8, 1991. An election was held on March 28, 1991, and the Union was certified on April 10, 1991, as the collective-bargaining representative for that unit. Subsequently, the parties negotiated and executed a collective-bargaining agreement effective December 20, 1991, through December 31, 1994.

1. The 8(a)(1) allegations-facts, discussion, and analysis

a. *Refusal to allow mugs or union buttons*

Sometime in early February 1991,[84] prior to the election on March 28, Charles Williams, cook supervisor in the dietary department, and Joanne Williams, his wife, a

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[83] Faulkner is now married and her married name is Washington.

[84] All dates refer to 1991 unless otherwise indicated.

dietary aide, were in the office of Kathleen Pereira, food service manager at the facility, where they were discussing scheduling matters. Chris Holmes, a NA, came into the office with two coffee mugs bearing the union logo, one each for Charles and Joanne Williams, "compliments of the Union." According to Charles and Joanne Williams, Pereira told Charles Williams to get the mugs out of her office. He went to put the mugs on the cook's sink and Pereira said, "No, out of the kitchen or I'll break them," whereupon Charles Williams took the cups and put them in his car. It is undisputed that other mugs with various commercial logos were kept and used by dietary department employees. The testimony of Joanne Williams essentially corroborates the testimony of her husband, except that she recalls Holmes bringing only one mug into the office.

According to Joanne Williams, Pereira also told employees at a meeting prior to the election that they were not permitted to wear union buttons in the kitchen, although it is undisputed that for some time prior to the election, several employees, including Charles Williams, wore union buttons on a continuing basis in the kitchen, apparently without restriction.

Pereira, in recalling the coffee mug conversation, testified that she told Charles Williams only to take the mug off her desk and that, thereafter, she continued to see union mugs in the kitchen area. Pereira denied any discussion about union buttons and testified that two-thirds of the dietary department employees wore them before the election, including Charles Williams, and that there was no restriction on wearing union buttons.

Having reviewed the relevant testimony, I am persuaded, based on the corroborated testimony of Charles and Joanne Williams, that Pereira did tell Williams to remove

the union coffee mugs from the facility. Such restrictions constitute unlawful interference with the organizational rights of employees.[85]

I further conclude, however, noting the denial of Pereira and the lack of corroboration by Charles Williams or other dietary department employees, that Pereira did not make the remarks attributed to her prohibiting the wearing of union buttons.

b. *January 26-impression of surveillance--prohibition of union activity*

Valerie Faulkner, a NA, testified that on or about January 26, 1991, at the nurses station on the first floor of the facility, she was approached by Administrator Jonathan Eigen who engaged her in conversation concerning the union organizational campaign. According to Faulkner, he told her that she had missed a mandatory meeting the previous day in

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[85] With respect to the matter of supervisory status, the evidence shows that Charles Williams normally worked from noon until 8 a.m. and Pereira from 8 a.m. to 4 p.m. and that after Pereira left for the day, Charles Williams assumed overall responsibility for the operations of the kitchen and the dietary department employees working there. He was also responsible for the closing of kitchen operations for the day at 8 p.m. Williams was also responsible for evaluating the work performance of employees who worked during those hours when he, rather than Pereira, was responsible for the work activities of the department. Although the written evaluations were signed by Pereira, she testified that she relied totally on the evaluations received from Charles Williams. I am satisfied based on this record, despite the fact that Williams does not have the authority to hire or fire, and that he voted in the union election, that he is a supervisor within the meaning of the Act. The unlawful remarks concerning the mug was nonetheless coercive, however, because it was made in the presence of Joanne Williams, who was an employee.

which the employees were told that speaking about union activity was prohibited in front of residents or on the nursing floor and had to be "restricted to the break area." He also told her that he would not tell her how to vote, even though he knew where she stood, that she was prounion. Eigen denied having made such statements to Faulkner, however, having reviewed the record, I am persuaded that Faulkner's account is credible. Eigen also testified that he had already been told by department heads in early January that Faulkner was one of the union organizers, long before the January 26 conversation. But even assuming that Eigen had prior knowledge of Faulkner's union activity, the effect of Eigen's remarks, in these circumstances, was to suggest to Faulkner that her union activity was somehow being monitored, otherwise how would he have become aware that she was a union supporter? Such remarks constitutes 8(a)(1) interference with the rights of employees to select union representation of their own choosing without employer interference. Further, advising Faulkner that employee organizing had to be limited to the breakroom was unlawfully restrictive because it limited organizational activity to a greater extent than permissible under existing Board and court law.

c. *Criticizing Denita Taylor for bringing up the Union at staff rneeting and telling her to quit*

Denita Taylor, a NA, testified concerning a staff in-service meeting[86] in mid-February 1991. At this meeting, Kathleen Sobeck, director of staff development, advised them that a change would be made in the way that soiled laundry

[86] The purpose of the in-service meeting was to discuss work-related issues with employees.

was collected. This change created additional work for the NAs. Apparently, Taylor took issue with the change and became vocal and outspoken in expressing her disagreement. Sobeck apparently regarded Taylor's conduct as disruptive and reported it to Eigen who called both Sobeck and Taylor to a meeting in his office on that same day. According to Taylor, she was criticized by Sobeck for having an "attitude" because of her conduct at the in-service meeting and "bringing the Union up." According to Taylor, Eigen told her that maybe this job was too stressful for her and that she should find some other line of work.

Sobeck and Eigen both testified concerning a meeting afterward in his office. Both testified that the meeting was to reprimand Taylor for disrupting the in-service meeting and had nothing to do with the Union nor was the Union mentioned at this meeting.[87] Eigen testified that he did tell Taylor that she should consider whether or not the job were right for her if it were causing her pain. Having reviewed the relevant testimony, I feel that it is insufficient, particularly in view of the corroborating testimony of Eigen and Sobeck, to conclude that Sobeck criticized Taylor for bringing up the subject of the Union at the in-service meeting. Although Eigen did suggest that Taylor might want to consider other employment because of the stress in her work, 1 cannot conclude that this observation was related to the Union or its organizational effort and cannot be viewed as interference with organizational activity within the meaning of Section 8(a)(l) of the Act.

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[87] Sobeck and Taylor agree that the Union was not mentioned at the in-service meeting.

d. *Observing and inhibiting union activity by Marek*

Steve Marek was a labor consultant employed by the Respondent to assist management at the facility to present management views to the employees as part of Respondent's election campaign. He arrived about mid-February 1991.

It is undisputed that he spent substantial periods of time in the employee breakroom or at a close by area near the timeclock; by his own estimate, about 25 percent of his worktime. Marek testified that while he was there he spoke to as many employees as possible on all three shifts to "educate'' them concerning the position of management. He also answered questions from employees and visited the breakroom to ascertain that promanagement materials were properly displayed. Although the General Counsel contends that Marek was "stationed" in the breakroom for the "purpose of observing and inhibiting" union activity of employees, the record does not support the conclusion that his activity was unlawful. Marek was free to present management's position to the employees in any noncoemive fashion available to him.

e. *Interrogations by Marek*

Harry Brooks, a NA, testified that during the election campaign, Marek approached him in the breakroom, introduced himself, and told him that he was going to educate him about management's viewpoint. Brooks, who was wearing a union button at the time, told him that he had enough education, but Marek persisted and asked him how he would vote in the election. Brooks responded by telling Marek he could see the union button he was wearing and that was how he was voting. Marek recalls a conversation with Brooks. Brooks asked about the results if the Union won the election.

They discussed the negotiating process. Brooks offered the opinion that it would be best for the facility if the Union were to win. Marek denies that he asked Brooks how he intended to vote, but, having reviewed the relevant testimony, I conclude that he did. Nonetheless, in these cimumstances, when an active union advocate wearing a union button is asked that question, the effect is basically rhetorical and, in these circumstances, does not violate Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176 (1984).

Faulkner testified that she spoke to Marek at various times at the facility in February 1991 about the Union and that there was one time that he called her aside into a closed room to speak to her separately. According to Faulkner, he asked her if she felt that the Union would make any changes if it got in and she replied, "maybe." He conceded to her that the facility was a mess, that Eigen had made a lot of mistakes, but asked if they would give him another chance. Marek testified that he was aware that Faulkner was a union organizer, wore a union button, and distributed union literature and that he spoke to her often about the Union. They discussed what union negotiations might bring. He admits asking her what she thought a union would do for her and that she replied it would be good. In these circumstances and on the facts of this record, I cannot conclude, even crediting Faulkner's testimony, that Marek's remarks can be construed as unlawful interrogation of Faulkner about her union sympathies. Fanlkner was an open, active, vocal union leader simply discussing with Marek the facility's need for a union and the ramifications of union representation.

f. *Creating impression of surveillance by Shuman*

On the day after the election, March 29, about 3 p.m., Tom Shuman, director of plant operations, approached Faulkner on the front porch of the facility and congratulated her on the Union's victory, telling her that nursing did what it needed to do, adding that he knew that his people, presumably the maintenance people, had voted against the Union because of the way the ballots came out of the box during the counting of the ballots. Faulkner thought this was a strange conclusion to draw but replied only, "oh" and left. Even crediting Faulkner's version, as I do, particularly as Shuman did not testify, I cannot conclude that his remarks created an impression among the employees that their union activities were under surveillance. In essence, he was simply telling Faulkner about his somewhat implausible theory for concluding that his employees had voted for the Union. I cannot conclude that this was threatening or otherwise coercive within the meaning of Section 8(a)(l) of the Act.

2. Allegations of discrimination--Faulkner

a. *Facts*

Valerie Faulkner was an active union adherent from the beginning of the Union's organizational effort in early January 1991. She solicited and obtained union authorizations cards on behalf of the Union. She was a member of the union organizing committee and distributed union leaflets on a weekly basis that bore her signature as a member of the union organizing committee. It was stipulated at the hearing that all of the supervisors' named in the complaint had seen the pamphlets that bore the names of those employees on the union organizing committee. She solicited employees to sign union authorization cards and, after the Respondent declined

the Union's request for recognition on February 1, she openly and vocally supported the Union and wore a union button to manifest that support. Clearly, Faulkner was an active union supporter and all of Respondent's management was aware of it.

On or about February 11, 1991, Faulkner, who worked as a nurses aide on the day shift (7 a.m. to 3 p.m.), was told by Nancy Frye, DON, and Richard Leonard, ADON, that because of her leadership qualities, she was being transferred from the first floor of the facility to the second floor so as to improve the operation there. At this time, Faulkner told Frye that she was 6 weeks pregnant but Frye told her that the transfer was still necessary. Faulkner began working on the second floor, but she became nauseous and went home for the day. After a scheduled day off, she returned on February 13, but her timecard was not in the rack. She asked Leonard why it had been removed. Leonard replied that Eigen wanted her to get a statement from her doctor that she was able to perform all of the job duties even through she was pregnant. She went to her the doctor on the same day, but the doctor, unable to examine her that day, simply gave her a note saying she could work until her first prenatal visit. She returned and gave the note to Leonard about 2:45 p.m.

When Faulkner came in the following day to start work, once again her timecard was not in the rack. Again she sought out Leonard who told her that the note was not sufficient and that she would not be allowed to return to work until her doctor had specifically cleared her to perform the duties set out in her job description. She obtained an appointment with the doctor and then spoke to Eigen in his office. Eigen explained that he was concerned for the health

of her baby. He gave her a job description for the doctor to sign.

Two days later Faulkner saw the doctor and got a letter from him dated February 20 stating that Faulkner was capable of fulfilling her job description. She brought it to Leonard and the following day resumed work.

Eigen concedes that there is no formal company policy requiting pregnant employees to have their job descriptions approved by a doctor in order to work. Eigen testified, however, that when he is aware of a problem during a pregnancy, he requires that this be done because he does not want to be responsible for an injury or miscarriage. Eigen further testified that when he was told by Frye and Leonard that Faulkner had gone home with nausea on February 11, he became concerned and requested that she have a doctor sign her job description.[88]

Eigen testified that other pregnant employees were required to get job descriptions signed by doctors. The record discloses that Judith Gantz, however, another NA, obtained only a doctor's statement to show she was pregnant and she worked throughout her pregnancy without, so far as the record discloses, any job description signed by her doctor. Another NA, Evelyn Pastrana, testified that in early May 1991, she was experiencing difficulty early in her pregnancy and requested light duty from Leonard. This request was denied and Pastrana was allowed by Leonard to go on medical leave. She did, however, continue to work for a short period after disclosing her physical problems to Leonard. After going

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[88] Frye did not testify, and Leonard, while he did testify, did not testify concerning this allegation.

on medical leave, Pastrana never returned to work at the facility.[89]

b. *Discussion and analysis*

Faulkner was not allowed to work until she obtained a doctor's certificate that she was able to perform all the duties in her job description. Faulkner testified, and it is not disputed, that she lost about 4 days in obtaining the required certification from the doctor. The General Counsel contends that this requirement was discriminatory and was applied to Faulkner for having engaged in activity on behalf of the Union. I agree.

First, the Respondent does not contend that there is any written or even standard policy for determining who must obtain job description certification from a doctor, nor does the record show that there was any uniform policy applied for illness related to pregnancy. Indeed, in two other instances, specifically Gantz and Pastrana, the problem was treated differently. So the question remains, why this requirement, which deprived Faulkner of several days of employment, imposed?

In reviewing the record, it is clear that Faulkner was among the most active and vocal of the union supporters and that her union sentiments were well known to management, including Eigen and Leonard. In evaluating the conduct of

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[89] A letter from Leonard to Pastrana dated May 8 appears to require a doctor's approval of her job description before she could return. Pastrana denies ever receiving it, however, and there is no proof of delivery, although a notation to that effect appears on the letter. In these circumstances, I cannot conclude that Pastrana received the letter.

Eigen and Leonard in refusing to allow Faulkner to work, a look at the circumstances makes it suspect. All that Eigen knew when he imposed the requirement was a report that Faulkner had left work early on a single day with nausea. It is difficult to believe that based on this one piece of information, that Eigen would conclude that Faulkner, who appeared to be a strong, healthy person, would immediately be precluded from returning to work without a doctor's certificate reciting her ability to perform all the assignments in her job description. The record does not support Respondent's contention that Eigen was acting out of concern for the well-being of Faulkner or her baby. We must look elsewhere for motivation. In my opinion, that motivation had its genesis in Faulkner's activity on behalf of the Union. This record supports the conclusion that Faulkner was denied work not out of Eigen's concern for her health or her baby's health, but because she was was actively supporting the Union during the organizing campaign.

3. Johnson's suspension and discharge

a. *Facts*

Amy Johnson was a CNA on the day shift. Like Faulkner, she was among the first to support the Union's organizational effort at the facility. She was a member of the union organizing committee and distributed pro-Union leaflets at the facility on more than five occasions and was observed by Eigen while so engaged. Her name appeared on the union pamphlets as a member of the union organizing committee and, as noted earlier, the parties stipulated that these pamphlets were seen by management supervisors. Johnson also solicited employees to sign union authorization cards and

obtained signed authorization cards from about 15 employees, which she gave to the Union, and she also wore a union button.

On April 11 in the early afternoon, at the facility, Johnson was about to leave the floor to get ice for the residents when she was called to attend a checkup in-service training session about lifting techniques and transferring patients being conducted by Valerie Ashford, a physical therapy aide. She stopped getting the ice and went to the training session. Ashford read a description of the training to them and all signed a report of the meeting attesting to their attendance. As Johnson had begun getting the ice, she asked Ashford if she could finish that job and then return to the session. According to Johnson, Ashford agreed and Johnson finished getting the ice and returned to the session. Ashford did not testify, but Pastrana, another NA in attendance, testified that Johnson did ask permission and was allowed to leave to getice for the patients.[90] Thereafter, she returned to the session where she participated in the transfer of a patient as a part of the training session. Johnson testified that Ashford did not appear upset when she returned and did not say anything critical to her.

A few days later, Leonard mentioned to Johnson that she might be disciplined for leaving the session without permission, and Johnson replied that she had asked for and received permission to leave from Ashford.

Nonetheless, on April 16, after she had punched out, she was told to see Leonard who was then in Eigen's office. As he left Eigen's office, Leonard approached Johnson and

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[90] Ashford did not testify, and her accounts of the incident appearing in R. Exh. 1, marked for identification, but not admitted, are not in evidence, and are hearsay in any event.

told her she was going to get the writeup. As they were walking from there to Leonard's office, according to both Leonard and Sobeck, she said, referring to Ashford who was nearby, that she would "whip her ass." Johnson denies this but rather that she said, "I have a trick for her ass." Once in Leonard's office, she was given a copy of a disciplinary "Final Warning" memorandum for "Group I #3 Leaving department or assigned working area during shift without immediate supervisor's approval."[91] This written warning was prepared at Eigen's direction and signed by Leonard as supervisor and Eigen as administrator. Johnson refused to sign for the receipt of the warning.

After leaving Leonard's office, Johnson called the Union and spoke to Union Representative Dean Topakian, who advised her to return and get a copy of the disciplinary memo. She returned to the facility with Topakian. Topakian was denied entrance into Eigen's office, however, so Johnson went in by herself. Once in Eigen's office, she requested a copy of the memo for the union representative and their attorney. Eigen replied that the final decision would not be made by the Union, and that he wished that the Union would buy a nursing home, and take all the employees with it. He also told her that although she was a good worker, if she got one more "write up," she was out. She said she knew that. She was given a copy of the warning memo and left.

Eigen testified that a "final warning" was issued because Johnson had previously been issued a warning for using foul or abusive language to a coworker. Eigen also testified that this memo was cleared with Martinez, because during this organizing period it was company policy to clear

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[91] It does not appear that Ashford was a supervisor, but rather a physical therapy aide.

all disciplinary memos with the human resources department. After consulting with Martinez, it was also decided not to issue any written warning based on Johnson's comments to Leonard about Ashford, as it appears that Ashford did not hear them.

The incident immediately preceding Johnson's discharge occurred on May 28. Johnson testified that she was assigned to the personal care of anywhere from 11 to 13 patients and that 2 of those patients were Ellen Leed and Mable French, who had rooms across from one another. On this morning French had two visitors, Ruth Ann Johnson, who was Leed's granddaughter, and Ardeth Haddon, her daughter. After finishing the morning care for French, Amy Johnson went for some shampoo and thereafter across the hall to Leed's room where she was assisting Leed to the shower room to take a shower. Leed was in a shower chair. At this point, Ruth Johnson interrupted her to say that French had expressed a need to go to the bathroom and asked Amy Johnson to take her. Johnson replied that she had just taken her to the bathroom but left Leed and went over to French's room anyway. On entering the room and slamming the door behind her, she asked French if she really needed to go. French responded affirmatively and Johnson began to get her out of her wheelchair onto the commode. In the meantime, Leed had begun screaming, demanding that she wanted to be given her shower.

At about this point, Eigen came into French's room. He asked the two visitors if Johnson had slammed the door or was talking loudly, and they said that she had. Eigen commenced to reprimand her for the loud tone of voice she was using. Johnson objected to being reprimanded in front of French and her visitors and stated that she had only told Leed, however loudly, that she was only one person and would be

back to give her a shower shortly. Johnson asked Eigen to leave so that she could take French to the bathroom, and he did so, slamming the door as he left.

Later in the morning, just before lunch, Leonard gave Johnson a written disciplinary memorandum dated May 28, 1991, providing a 3-day suspension pending an investigation for patient abuse. The body of the memo, signed by Eigen, reads:

> I overheard Amy Johnson yelling at 2 residents and then slam the door to the room of one of the residents whom she was removing from the commode. Two members of the resident's family were present. I informed Ms. Johnson her conduct was inappropriate and disciplinary action would result.

After 3 days, on Friday, May 31, Johnson called to inquire about her status. She was told by Eigen that the matter was before higher authority and no decision had been made.

On June 5, Eigen called to advise her that she was being terminated for patient abuse. She asked for a copy of the disciplinary memo. Eigen agreed. She came to the facility and obtained a copy of a disciplinary memo dated June 5 reciting her discharge for patient abuse, and referring to the May 28 disciplinary memo for "details."

Eigen testified, concerning the incident, that he was walking down the hall when he heard screaming across the hall from French's room to Leed's room to "shut up" and Johnson saying that she would get to Leed when she got a chance and that Johnson then slammed the door to French's room. Thereafter, he went into French's room, where Johnson was assisting French, and solicited both of the visitors to

come to his office after their visit with French to tell him what they had seen. They did so, and Eigen solicited from them a statement and also obtained a statement from Leed. Neither of the two visitors nor Leed testified at the hearing. Eigen also testified that as a matter of policy, he consulted with Raymond Martinez, regional human resources representative. Eigen faxed Martinez the information he had gathered, and subsequently they agreed that discharge was appropriate, whereupon the disciplinary discharge memo was made up and given to Johnson on June 5.[92]

b. *Discussion and analysis*

Clearly, Johnson was among the most active union supporters during the Union's organizational effort. As noted above, she was a member of the organizing committee and wore a union button during the campaign. She also solicited union authorization cards, distributed union pamphlets, and was observed by Eigen so engaged. The General Counsel has established that Johnson was engaged in union activity and the Respondent was aware that she was so engaged. It remains for the General Counsel to show that disciplinary action taken against Johnson was motivated by her union activity rather than for valid and lawful considerations. This has been done.

In evaluating the testimony concerning the April 11 incident, it is significant to note that Ashford did not testify and that Ashford was not a supervisor but a rather non-supervisory physical therapy aide. The only witnesses to the incident who testified were Johnson and Pastrana whose testimony is mutually corroborative. Having reviewed the

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[92] Martinez did not testify

record, it is my conclusion that these accounts are credible and that the facts disclose that Johnson interrupted getting ice for patients on being called to an in-service training session. She went to the training session, listened to a reading of the subject matter, and signed the attendance sheet. Thereafter, on obtaining permission, she left to finish getting ice and later returned to complete the training session. It does not appear that Ashford expressed any disapproval to Johnson for anything she had done. In these circumstances, the record is totally insufficient to support the Respondent's contention that Johnson was given a disciplinary warning memo for "leaving department or assigned working area during shift without immediate supervisor's approval." Given the Respondent's union animus, demonstrated by a strong antiunion campaign, and the total absence of any credible justification, I conclude that that reason assigned by Respondent for issuing its disciplinary warning of April 16 was a pretext and that Johnson was actually given retaliatory discipline for having supported the Union during its successful bid to organize the Respondent's service and maintenance employees.[93]

With respect to the 8(a)(1) allegation involving Johnson, as noted above, at the time Johnson obtained a copy of the disciplinary memo on April 16, she was told by Eigen that if she received another disciplinary memo, she would be out. Given the fact that 1 have concluded that the disciplinary memo dated April 16 was unlawfully discriminatory, Eigen's threatening reference to her discharge for receiving another was also unlawful under Section 8(a)(1) of the Act. I cannot conclude that Section 8(a)(1) was violated, however, when Eigen expressed the hope that the Union would buy a nursing

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[93] As noted earlier, the Union was certified on April 10.

home and take the employees with it. Nor does it appear to me to restrict any of the rights set out in Section 7 of the Act for Eigen to have expressed the view that it would not matter if the disciplinary action was given to an attorney. This was only an observation by Eigen without coercive implications.

Turning now to the incident of May 28, which led to Johnson's discharge, the record discloses that only two witnesses testified at the hearing, Johnson and Eigen, and Eigen did not witness all that transpired. None of the other witnesses, Leed, French, Ruth Johnson, or Ardeth Haddon testified, and statements taken from them are hearsay, without evidentiary value. Martinez, although involved in the decision to discharge Johnson, was not called to testify either. Having reviewed the probative testimony, I am satisfied that Johnson found herself in the unenviable position of having to simultaneously attend to the needs of two elderly and disabled patients, one of whom she was taking for a shower and the other who needed to go to the bathroom. She made a reasonable judgment that the patient needing to go to the bathroom, French, would be given priority whereupon she would then return to give Leed a shower. When she left Leed to care for French, Leed loudly complained that she wanted her shower. Johnson loudly responded that she would come back shortly. Johnson went into French's room, perhaps somewhat exasperated because she had taken French to the bathroom just minutes earlier, slamming the door behind her. After inquiring if she really needed to go, Johnson assisted French to the bathroom. Eigen came on the scene and inquired of the visitors about the problem and solicited them both to come to his office to give a statement after their visit. He also obtained a statement from Leed, although neither of these individuals, nor French, had complained about the incident to Eigen themselves.

In my opinion, this was a brief and inconsequential event, even assuming, as I do, that Johnson did yell to Leed and did slam the door to French's room. In my opinion, Eigen, on his own initiative, deliberately overreacted to what little he had observed and seized on the incident as a vehicle by which to discharge Johnson. He solicited statements to support this objective and labeled the incident "patient abuse" for the purpose of discharging Johnson. In other words, without condoning what Johnson did, I conclude, noting particularly the discriminatory intent manifested by the unlawful disciplinary memorandum of April 16, that Eigen's proffered justification for Johnson's discharge was a pretext and that the motive was actually retaliatory against Eigen for having been a union adherent.

In applying the *Wright Line*[94] criteria to this matter, I conclude that the General Counsel has made a prima facie showing that union activity was a motivating factor in the Respondent's decision to discharge Johnson. Further, I am satisfied that the evidence offered by the Respondent to support its decision to discharge Johnson is totally insufficient to support its burden of showing that it would have discharged Johnson, even in the absence of her protected concerted activity.[95]

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[94] 251 NLRB 1083 (1980).

[95] Although Respondent contends that Johnson had previously forced-fed French a dietary supplement, as additional justification for Johnson's discharge, the probative evidence to support this contention is totally insufficient. Nor are the disciplinary discharge memo-ranch of other employees persuasive because, even conceding that other employees were discharged for various offenses, including patient abuse, these memoranda are insufficient in any evidentiary way to support the Respondent's position that Johnson's discharge was justified on the facts of the

Accordingly, I conclude that Respondent violated Section 8(a)(3) of the Act by issuing a written disciplinary warning and suspending Johnson on April 12 and by discharging Johnson on June 5. Further, threatening discharge for receiving another disciplinary memo, in circumstances when the prior disciplinary memo was unlawful, violates Section 8(a)(1) of the Act.

S. *Carpenter Care Center, Tunkhannock, Pennsylvania (1)*

Statement of the Case

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by making "comments to an employee demeaning the employee's participation in a Union initiated OSHA investigation that was being conducted at Respondent's Tunkhannock's facility."

Respondent is also alleged to have violated Section 8(a)(3) of the Act by issuing disciplinary warnings to employees in retaliation for their picketing or having filed a contract grievance. The complaint also alleges 8(a)(3) violations in suspending, warning, and reassigning employee Allison Reaves "because Allison Reaves encouraged a patient to participate in a Union-initiated investigation by OSHA of Respondent's Tunkhannock facility."

Also, Respondent is alleged to have violated Section 8(a)(5) of the Act by changing the procedures "by which employees who receive work-related injuries are reimbursed for medication," and by refusing to furnish information to

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instant case.

District 1199P National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (the Union), which information was necessary and relevant to the Union in the "performance of its duties as the exclusive collective-bargaining representative of the Unit."[96]

1. Facts

a. *Timecard violations---disciplinary warnings*

In late April 1991,[97] Donna Connery came to the Carpenter Care Center facility as administrator, a post in which she had served previously from 1988 to 1990. According to Connery, after she arrived, she began to review company payroll documents and discovered that they were not consistent and determined that there was a problem with employees being paid for time they did not work, notably at the beginning and end of their shifts.

It appears that it had the practice to allow a 7-minute grace period for punching in and out at the beginning and end of the shifts. For example, assuming that an employee worked the afternoon shift from 3 to 11 p.m., the employee would be allowed to punch in from 3 to 3:07 p.m. without pay being docked and to leave anywhere from 10:53 to 11 p.m. without being docked. It also appears that if an employee punched in earlier than 2:53 p.m., the employee would be paid 15 minutes of overtime. Likewise, if an employee punched out later than 3:07 p.m., that employee would get 15 minutes of

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[96] No opposition thereto having been filed, Respondent's motions to correct the transcript are hereby granted.

[97] All dates refer to 1991 unless otherwise indicated.

overtime pay. According to Connery, employees were required to obtain the written authorization of a supervisor every time overtime was paid and that this was not being done. Although conceding the existence of a 7-minute grace period for pay concerning punching in late and out early, Connery testified that Respondent's policy required that written authorization of a supervisor be obtained for overtime, even for periods of overtime as short as 1 minute. Connery contended that otherwise, employees were being paid for time they did not work, or that was not authorized, in violation of company policy.[98] The bookkeeper simply paid for all the time shown on the timecards and was unaware whether it had been authorized or not.

It appears that the employees, prior to Connery's arrival, were being paid not only for time worked within the 7-minute grace period, but also for time worked in excess of the 7 minutes before and after work hours in quarter hour intervals without supervisory approval. The parties stipulated that no written disciplinary warnings had been issued in these instances from January 1, 1991, through the payroll period ending January 27, 1991, except in one isolated incident, and that the level of infractions occurred with about the same frequency and extent as those during a review period noted

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[98] The employee handbook states as "Minor Violations," the following infractions:

> 8. Clocking in early or clocking out late without the approval of your Supervisor.
>
> 9. Failure to clock/sign in or out for scheduled shift or meal periods; repeated incidents of clocking/signing in or out seven minutes before or after scheduled work shift.

below from June 28 to July 10 for which the disciplinary warnings were issued.

Connery issued a memo to the staff dated July 1 reading, in relevant part:

> Any additional time other than your regularly scheduled shift must be *initialed and approved* by the facility supervisor. This must be done before you leave the facility on that day. If time cards are handed in without proper approval payment will not be made.

This memo was distributed to staff employees with their paychecks on July 3.

On or about July 10, Connery spoke to Jean Franko, DON, and instructed her to review the time period from June 28 to the payroll period ending date July 10 and to issue disciplinary warnings for violations of company timecard policies during that period. Franko did so, and disciplinary warnings were issued to some 26 LPNs and nurses aides for various infractions, mostly leaving or arriving late, for however short a duration, or working overtime, without authorization from a supervisor. The written disciplinary warnings were all attached to paychecks issued on the payday of July 18, 1991.

To put the matter in perspective, it appears that previously, by letter dated July 2, John August, president of the Union, had written to Connery to advise her that the Union would be engaging in informational picketing at the

facility from 1:30 until 4:30 p.m. on Thursday, July 18.[99] Connery was not at the facility when the letter arrived on July 3 but was called at home by Franko who informed her of the contents of the letter. The picketing did, in fact, take place as scheduled, limited to the hours set out in August's letter, with picket signs alluding to such alleged deficiencies such as staffing shortages and patient care.

A contract grievance was subsequently filed by the Union, alleging discrimination against those employees who had been issued disciplinary notices, but the matter was resolved when Connery, on instructions from Michael Plott, human resources director for region 1, reduced the actions to oral counseling and 2 weeks' later, physically removed all the written disciplinary warnings from the employees' personnel files.

With respect to the allegations of discrimination against Charles Benninger, it appears that Benninger, a CNA, was employed on the 11 p.m. to 7 a.m. shift. On the night of June 22, he was working with NA Jennifer Benett. Benett went home sick and was not replaced, however, causing the shift to work shorthanded and making it necessary for Benninger to work overtime through his ½-hour supper break. Benninger did not punch in or out for a supper break as he normally would have done nor did he get this overtime authorized by a supervisor.[100] Benninger was not paid for this ½-hour overtime and he filed a grievance on July 10,

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[99] The Union represented under separate contracts, units of LPNs and service and maintenance employees. Both contracts were to expire on November 30, 1992.

[100] Respondent's action in refusing to pay Benninger was later rescinded on July 16.

protesting Respondent's refusal to pay him the overtime though he concedes that any overtime in excess of 7 minutes should have been authorized by a supervisor because that was the proper procedure.

Thereafter, on July 18, Benninger was issued a disciplinary warning that he received with his paycheck on that day reciting, "Failure to take lunch break. Did not receive approval from 11-7 Supervisor."[101]

Benninger participated in the picketing that took place on July 18 between 1:30 and 4 p.m. and thereafter worked his regular shift from 11 p.m. to 7 a.m.

b. *Unilateral changes--reimbursement for prescription drugs*

Respondent provides reimbursement to employees for prescription drug expenses in connection with work-related injuries arising under Workmen's Compensation statutes. Prior to February 1992, it had been the practice for employees to go to the pharmacy used by the facility where they could either pay for those prescriptions and be reimbursed at the facility out of petty cash on presentation of their receipt or when they went to the pharmacy, the pharmacy would call to confirm their employee status whereupon the pharmacy would bill the facility.

According to Connery, the problem with this system was that the pharmacy did not always call to confirm the employee status and that prescriptions for injuries not arising under Workmen's Compensation were also being paid.

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[101] This was a second disciplinary warning issued to Benninger on July 18, he was also among the group of 26 issued warnings at this time for timecard violations.

Connery discussed the matter with Plott and raised the problem with its workmen's compensation insurance carrier, Travelers Insurance Company, in February 1992. The problem was corrected at that time by initiating a system whereby the employee paid for the prescription and, thereafter, either submitted receipts directly to the insurance company for reimbursement or brought the receipt to the facility where the facility submitted them on behalf of the employee for reimbursement to the employee. The new system caused delays in reimbursement, ranging from 2 weeks to 2 to 3 months.

Connery admits that this change in the manner of reimbursement was made without notice or consultation with the Union because it was her understanding that because the reimbursement required under workmen's compensation for work-related injuries was still being made, it was not necessary to discuss the manner or reimbursement with the Union.

c. *Demeaning comments--8(a)(1)*

In the first week of January 1992, OSHA investigators conducted an investigation at the facility concerning work-related injuries. Employees were interviewed by investigators in a conference room at the facility. Audrey Russell, CNA and president of the local chapter of District 1199P, was designated by the Union to be present for interviews conducted before her shift began. She worked from 3 to 11 p.m., so she spent considerable more time at the facility than normal during the some 4 days that OSHA was conducting the investigation.

According to Russell, during this period of time, Connery once spoke to her, asking if her "fanny" was getting

tired from sitting. At another time, as she was leaving the premises, Connery noted she was "leaving so soon," and Russell responded that she had a life other than the facility. On another occasion, Connery said that she might have a room or closet at the facility for her because she was spending so much time, to which Russell testified that she may have responded with a laugh. Other than the comments about finding a room, Connery denied making the comments attributed to her by Russell.

d. *Allison Reaves' suspension and transfer*

On or about November 20, pursuant to a complaint filed with OSHA by the Union concerning work-related injuries from lifting residents, investigators from OSHA appeared at the facility. At that time, they were denied admission by Connery. The investigators reappeared on November 21 with a Federal District Court warrant and, on the advice of her superior and corporate legal counsel, Connery again refused to allow the investigators on the premises. The investigation was to have included the videotaping of residents being lifted and transferred by employees. After some litigation, Respondent was ordered to permit the inspection, including videotaping, on obtaining a written consent or release from those residents videotaped.

A list of suitable residents was compiled by management. Those residents on the list were visited by teams of three management employees to inquire about their willingness to participate in the videotaping of the OSHA investigation. A team comprised of Jean Franko, DON, Mary Zawicki, social services director, and Lori King, LPN charge nurse on the gold wing, visited Olive Wells, one of the

preselected residents, on January 13, 1992.[102] According to Franko, it was difficult to explain the concept of the OSHA complaint and videotaped investigation to Wells and Wells appeared to be concerned about a Government agency coming into the facility. Wells was uncertain about participating in the plan and mentioned speaking to her daughter about it. As the team left, Wells commented that she did not think it would be necessary, and that she felt her daughter would agree.[103]

On January 13, Allison Reaves worked the 3 to 11 p.m. shift. She was told during a break by Tammy Reider, a NA, that Wells was upset because she was not sure she had made the right decision in not signing the release.

The next night, January 14, Reaves returned to the gold wing and spoke to Wells about 7:30 or 8 p.m. as she was putting her to bed. Wells appeared to be upset and Reaves asked her how she was. Wells told her that three women had come to talk to her the previous night and that she was afraid that if she signed a release to be videotaped, the State would either come in and take the place over or close it down. According to Reaves, Wells was a nervous woman who "worried about things a lot." Reaves explained why OSHA had come and that they could show the employees ways of lifting without getting hurt and possibly get them more help. Reaves also advised her to call her daughter if anyone came in like that again, and also that if she was ever asked again to sign a release form, that it would be fine to sign it. Reaves testified that she did not raise her voice to Wells nor speak to

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[102] All dates refer to 1992 unless otherwise indicated.

[103] None of the others present, Wells, King, or Zawicki, testified at the hearing.

her in a critical way. Nor did Wells indicate that she was upset with Reaves.

On the following day, January 15, according to Connery, King came to her office and told her that she had a received a complaint from Wells to the effect that she had been "yelled at" the night before and wanted to register a complaint with the administrator. Thereupon, Connery, Franko, and King visited Wells. According to Connery and Franko, Wells told them that a nurse had yelled at her the prior night, telling her that it was her fault that they would not be getting any more staff at the facility because she refused to have movie taken. Wells expressed concern that she would not be taken care of and refused to identify the nurse because she was afraid because the nurse was still working there.

Later in the day Wells' daughter and son-in-law came to the facility and, before visiting Wells, stopped to speak to Franko in her office. They said that their mother was having problems with a nurse named Allison; that Allison was rude and yelled at her. Franko spoke to them about the Wells' "videotaping" complaint, and asked them to try to get the identity of the nurse when they spoke to her mother.

Sometime later, they returned and identified Reaves as the nurse, but also stated that they did not want Reaves to get into trouble over the matter and expressed no intent to file any complaint.

Reaves was scheduled off on January 15 but on January 16 she was called by ADON Gloria Eastwood to come early. When she arrived she was directed to Franko's office. Connery, Marge Liples, a nursing supervisor, and Eastwood were there, as well as Valerie Milliron, a union delegate. Connery advised Reaves that she was being suspended for yelling at Wells. The disciplinary memoranda given to Reaves states:

> Resident O. Wells states A. Reaves yelled at her and told her she should have signed paper from OSHA to be videotaped and we would have gotten more help.

Reaves denies this in the "Associate Comment" portion of the memoranda stating:

> I did not yell or harass resident. I just talked to resident to try and calm down. Resident afraid of State coming in.

A grievance was filed immediately and a second-step meeting on the grievance was held on January 21. On January 23, Reaves was called by the facility and told to come in dressed to go to work.

She reported to Connery's office when she was advised by Connery that the suspension was being dropped and that she would be reimbursed for the days of the suspension, also that she would receive a written oral warning and be required to attend in-service instruction on resident rights. Further, she would not be allowed to return to the gold wing where she normally worked. According to Franko and Connery, the decision to reassign Reaves was due to a concern for Wells' welfare as Wells was "still fearful and afraid."

On February 18, the Union filed a complaint under Section 1 l(c) of OSHA alleging that Reaves, among others, was disciplined for engaging in protected health and safety activity.

e. *Refusal to furnish information to the Union--Allison Reaves and Patricia Carr*

By letter dated January 23, Betsy Mazione, union organizer, wrote to Connery stating:

> I am requesting all evidence, statements and documentation leading to the suspension of Allison Reaves on January 17, 1992. This information is necessary in order to properly prepare for continuation to the next step of the grievance process.

By letter dated January 27, Connery sidestepped a direct response by stating:

> In response to your letter dated January 23, 1992; after investigation, the suspension of Allison Reaves has been stepped down to an oral warning. Ms. Reaves will be paid for all scheduled time lost and has been reassigned to another wing.
>
> It is my understanding that after meeting with Allison and her representative, Faye Brennan, that this matter has been resolved.[104]

Mazione testified that after receiving this letter, she called Reaves and was told by Reaves that Reaves did not feel that she should continue to have an oral reprimand in her file or to be moved from the gold wing.

Mazione testified that by the time she got Connery's letter and spoke to the "people involved," the time limit for

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[104] Faye Brennan is a union delegate and NA at the facility.

moving Reaves' grievance to the third step had expired, and the grievance was not pursued.[105] It does not appear that any request for extension of the time limit was made by the Union. According to Connery, such request would have been granted if it had been made.

Another request for the same information was made by letter dated February 18. Another grievance had been filed on behalf of another NA at the facility named Patricia Carr. She was suspended and subsequently discharged for patient abuse. The letter requesting information regarding both Carr and Reaves reads, in relevant part:

> I am requesting all evidence, statements and documentation leading to the suspension and subsequent termination of Patricia Carr.
>
> This information is necessary in order to properly prepare for continuation to the next step of the grievance process.
>
> As per my letter dated to you January 23, 1992, I am still requesting the information I requested on the suspension of Allison Reaves.

At a third-step grievance meeting on April 15, Respondent provided to the Union the information it had requested concerning Carr in the February 18 letter. Carr's discharge is scheduled for arbitration, but no date has yet been established.

2. Discussion and analysis

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[105] The contract provides 10 workdays for notice by the Union of its intention to submit a grievance to the third step after the administrator's response at the second step.

a. *Timecard violations--disciplinary warnings*

The General Counsel contends that the issuance of oral disciplinary warnings[106] to 26 employees, including Charles Benninger who received both an oral warning and a written warning, on January 18 was motivated by union picketing conducted on that date, of which Connery had previously been advised on July 3. Respondent argues that the issuance of the disciplinary warnings were designed to correct a longstanding problem of employees being paid for the time they did not work or was not authorized. In my opinion, the General Counsel must prevail.

First, it is undisputed that these timecard discrepancies existed long before Connery arrived at the facility and the parties stipulated that no disciplinary action, with one exception, had been taken for timecard infractions from January 1, 1991, until July 18, 1991, when the warnings were issued.

When Connery arrived, in an effort to correct the problem, she issued a staff memo dated July 1, advising employees that they would not be paid for any overtime. Overtime had to be initialed and approved by the facility supervisor or payment would not be approved. This memo did not warn or even suggest disciplinary action was contemplated. It simply stated that they would not be paid for any time not approved by a supervisor. It said nothing about any supplement to the existing company policy that appears in the employee handbook supplement set out above. Why then was the decision made to issue disciplinary warnings on the same day that the Union picketed? In my opinion, the decision

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[106] Although described as "oral warnings," they are issued in writing.

was retaliatory, made in response to the Union's announcement of the picketing.

Although Respondent argues that it was making a "bona fide" effort to correct timecard deficiencies, that does not explain the timing of the discipline, particularly in view of the fact that they were issued summarily, without any of the prior counseling provided for in the normal corrective action procedures set out in the employee handbook supplement.

In short, Connery, after receiving the Union's notice of intention to picket on July 3, responded by issuing disciplinary warnings on the day of the picketing.

Respondent's reliance on *Wright Line*[107] is misplaced. In my opinion, the General Counsel, based on these facts and the other prior unfair labor practices found herein at the facility, has made a prima facie showing sufficient to support the inference that the picketing, a protected activity, was a motivating factor in Respondent's decision to issue the warnings. Respondent has failed to sustain its burden of showing that the disciplinary action would have been taken even in the absence of that protected activity.

Regarding Benninger, as noted above, in addition to being one of the 26 issued disciplinary warnings for timecard discrepancies, was also issued a second warning, as set out above.

It is not disputed that Benninger worked overtime through his lunch hour because the shift was shorthanded and that he did not punch in and out. It also appears that it was not until a grievance was filed that Benninger was paid for the overtime.

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[107] 251 NLRB 1083 (1980).

Despite the fact that Benninger did not follow appropriate procedures in having the overtime approved, I am persuaded that consistent with the rationale set out above, that Respondent's motivation for the second disciplinary warning issued to Benninger was retaliatory. It was a response both to Benninger's filing the grievance on the matter and to the Union's decision to picket the facility.

Accordingly, I conclude that all of the disciplinary memos issued by Respondent on July 18 were discriminatory, within the meaning of Section 8(a)(3) of the Act.

b. Unilateral changes--reimbursement for prescription drugs

When Respondent changed its policy to require employees to pay for their drugs and then wait weeks or even months for reimbursement, this was clearly a change in the terms and conditions of their employment. Under well established Board and Court law, changes in the terms or conditions of employment of represented employees cannot lawfully be undertaken without notice and bargaining with the collective-bargaining representative over such changes. The record discloses; indeed the Respondent concedes, that no such notice or bargaining with the Union was undertaken. Accordingly, Respondent's action in unilaterally changing the method of reimbursement for prescription drugs under its workman's compensation procedures constitutes an unlawful refusal to bargain under Section 8(a)(5) of the Act.[108]

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[108] Respondent also argues that the Union waived its right to bargain over changes under the "Health and Welfare" provisions of the contracts in effect. This argument is misleading, however, because workmen's compensation benefits are not among those

c. *Demeaning comments--8(a)(1)*

Connery denied asking Russell if her "fanny" hurt from sitting on it during in on the interviews or commenting on her "leaving so soon." She admits telling Russell that they might need to find a room for her at the facility because she spent so much time there. It is unnecessary to make any credibility resolutions in this matter, because, even assuming that the remarks were made, they do not in my opinion violate the Act. The General Counsel takes the position that these remarks were "demeaning" of Russell's participation in the OSHA investigation so as to affect her employee stares. This is simply too much of a stretch. To begin with, the word "demeaning" means to degrade or debase. The comments alleged do not rise to that definition. In short, I conclude that these statements, even if made, were neither demeaning or coercive so as to constitute interference with any of the employee rights guaranteed in Section 7 of the Act.

d. *Allison Reaves' suspension and transfer*

The General Counsel contends that the disciplinary action taken by Respondent against Reaves was motivated by Reaves' encouraging a patient to participate in an OSHA investigation at the facility in violation of Section 8(a)(3) of the Act. Respondent contends that Reaves' comments to Wells were not protected concerted activity or union activity within the meaning of Section 8(a)(l) and (3) of the Act.

With respect to credibility issues, there is some conflict between the testimony of Reaves and the testimony of others with respect to what Reaves may have said to Wells

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plans covered by the contracts.

during their conversation on the evening of January 14. In this regard, I credit Reaves, particularly since Wells did not testify. Nor did Loft King, the charge nurse to whom Wells allegedly made her complaint and who reported the complaint to Connery.

Thus I conclude that Reaves explained to Wells, as she testified, the purpose of the OSHA visit and advised her to discuss such matters with her daughter and further advised her that if she was asked to sign a release, it would be "fine" to sign it. The probative evidence in the record supports that conclusion that Reaves encouraged Wells to cooperate with the OSHA investigation. The record does not support the conclusion that Reaves yelled, threatened, coerced, or otherwise intimidated Wells' during their conversation.

Based on these facts, there remains for consideration whether or not encouraging participation in an OSHA investigation is either union activity or protected concerted activity under the Act. Clearly, the activity for which Reaves was disciplined was not union activity. The General Counsel argues that since the OSHA investigation was initiated by the union complaint, Reaves' activity in supporting the investigation was protected. I do not agree. Although initiating an OSHA investigation with a complaint may be union activity, the decision to pursue the matter and the investigation were not Union but OSHA activities. Nor were Reaves' remarks protected concerted activity under Section 8(a)(l). The issue did not invoke the mutual aid or protection of employees. Reaves was merely responding, as an individual, to Wells' fears. Her decision to encourage Wells to participate in the OSHA investigation was hers alone, not done in concert with other employees in any fashion. Thus, even if Reaves were deemed to have been engaged in

protected activity, it could not be described as concerted activity.

In summary, this record does not support the conclusion that the disciplinary action taken against Reaves was attributable to any activity by Reaves protected under the Act, either as protected concerted activity or union activities under Section 8(a)(l) and (3) of the Act.

e. *Refusal to furnish information to the Union*

Any union is entitled to be provided, on request, with that information necessary and relevant to the union in carrying out the union's function as the collective-bargaining representative of unit employees. Clearly, during the grievance and arbitration process, the Union is entitled to whatever information is necessary and relevant to the processing of the grievance.

In applying this principal to the request for information concerning Reaves' discipline, the record discloses that through no fault of Respondent, the Union had not timely filed any notice of intent to pursue the grievance to the third step. In these circumstances, there was no pending grievance and no longer any viable union function to be served by providing information. This information was no longer either necessary or relevant to the Union in the grievance process. The Respondent was no longer obligated to provide that information and its failure to do so did not violate Section 8(a)(5) of the Act.

With respect to Cart, the information requested was provided, albeit some 2 months after the request was made. There has been no showing, however, that the Union has been prejudiced in its effort to prepare for the pending arbitration, particularly in view of the fact that at least as of the date of

the hearing, no date for arbitration had yet been established. Accordingly, I conclude that with respect to Cart, the information has been provided and there has been no showing that the Union has been prejudiced by any delay in providing it.

T. Carpenter Care Center, Tunkhannock, Pennsylvania (2)

Statement of the Case

In addition to the allegations of the complaint treated above in section A, the complaint also alleges, with respect to the Carpenter Care facility, that Respondent violated Section 8(a)(3) of the Act by refusing to permit Charles Benninger to return to work on the 11 p.m. to 7 a.m. (night) shift. Further, that Respondent violated Section 8(a)(5) of the Act by refusing to furnish, on request by the Union, a copy of a letter sent to the Pennsylvania State Department of Health concerning the alleged abuse of a resident named Lee Adams by CNA Dorothy Bush on May 31, 1992.

1. Facts

a. Refusal to furnish information

On May 31, 1992,[109] a LPN named Helen Evans reported to her supervisor, RN Suzanne Gilpin, an incident that she perceived as patient abuse that she had seen by a CNA named Dorothy Bush in slapping a patient's face and

[109] All dates refer to 1992 unless otherwise indicated.

twisting her arm. Pennsylvania State law and Respondent's procedures require that incidents of alleged patient abuse be reported to the State of Pennsylvania. These reporting procedures broke down, however, when Gilpin failed to report the incident to ADON Gloria Eastwood or any other higher authorities. It was not until July 3 that the matter came to the attention of higher authority when Evans asked Eastwood how the matter had been resolved. Eastwood, previously unaware of the matter, called Administrator Donna Connery on July 4, and Connery immediately notified the State and began an investigation of the incident. Connery then filed with the State, as required by the State, a written report on a form provided by the State, along with a supporting affidavit.[110] Connery also filed with the State statements taken from those individuals who witnessed the incident. In her report, Connery also provided to the State an explanation of the delay in reporting the incident and the Respondent's disciplinary memoranda describing the incident and the disciplinary action taken by the facility against Gilpin, Evans, and Bush. Bush was suspended on July 10, and the Union immediately filed a grievance. Bush was terminated on July 16 for patient abuse.

Also on July 10, at a meeting on various grievances at the facility, Betsy Mazione, a union representative, submitted to Connery in writing a request for information on various pending grievances including, with respect to Bush, "Copies of any written statements pertaining to Dorothy's [Bush] suspension" and "Any documentation that shows the date on which the allegation of patient abuse was verbally or in written form given to any supervisor or management

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[110] The full reporting requirements of the State are set out in the "Long Term Care Provider Bulletin No. 22."

personnel by Helen Evans on the alleged incident on May 31, 1992."

By letter dated July 21, 1992, which was hand-delivered to Mazione at another meeting on grievances at the facility on that date, Connery provided statements from Eastwood, Evans, Gilpin, Bush, assignment sheets showing Bush's patient assignments on May 31, a statement given by the patient's roommate, and the written disciplinary memoranda issued to Bush and Evans, all of which had previously been submitted to the State. Connery testified that this constituted the entire investigation.

The completed state report, including the explanation for the delay and the disciplinary action taken, including the action taken against Gilpin, were not provided to the Union. Connery testified that apart from the State report, all of the information obtained by her, as set out above, was submitted to the Union on July 20.

Even though Mazione received from Connery the information set out above, Mazione, at the end of the grievance meeting on July 20, again submitted a handwritten request for information concerning various grievances and specifically, with respect to the Bush incident, requested, "A copy of the letter(s) sent to the Department of Health on the alleged abuse of Lee Adams on May 31st 1992."

By typed letter dated August 4, Mazione wrote to Connery requesting as to the Bush incident, the same information requested by the July 20 handwritten request.

By letter dated August 6, Connery responded to Mazione's request for information. Specifically regarding the request for the letters sent to the State Department of Health, Connery stated that the requested information was not being provided, further explaining, "The reason for this omission is

that I feel these documents are internal instruments and not subject to disclosure."

Connery testified that she had provided to Mazione the entire fruits of the investigation, but that she felt that the facility's correspondence with the State was not subject to disclosure because it included information about disciplinary action taken against Gilpin, a registered nurse, who was not a bargaining unit employee, and information about planned corrective action to be taken at the facility. Connery testified that except for those items, with respect to the investigation of the incident, she had provided all the information that she had gathered concerning the incident.

b. *Benninger--refusal to return Benninger to night shift*

Charles Benninger, a CNA, was hired in December 1990 and joined the Union in March 1991. Benninger became a delegate for the Union in May 1991. He is also a member of the executive board of the Union and a member of the union negotiating committee for the Carpenter Care facility. Benninger normally worked on the night shift (11 p.m. to 7 a.m.) at the facility on the green wing. On the night shift, the green wing is normally staffed by two NAs and one LPN.

On June 12, 1992,[111] Benninger injured his back lifting a patient. Benninger was unable to work, and because it was a work-related injury, he was entitled to payment of a certain percentage of his wages under Commonwealth of Pennsylvania Workman's Compensation Act. He first visited a physician's assistant employed by Respondent, and thereafter, on June 29, visited a doctor of his own choosing

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[111] All dates refer to 1992 unless otherwise indicated.

named Anthony Flak who, by form dated June 29, estimated that Benninger's injury would prevent him from working from 30 to 90 days.

On August 7, pursuant to Respondent's request, Benninger returned to the facility Beverly forms consisting of a "Return to Work Order" and a "Light Duty Return to Work Certificate.'' These forms had been completed by Dr. Flak and dated August 5 and indicate that Benninger would be able to return to work in a light-duty status with various various work restrictions, to wit, no lifting, pulling, or pushing over 35 pounds and no lifting, rolling, pulling, turning, or pushing patients. Benninger and Franko reviewed the forms and modified the "Nurses Aide Light Duty Job Description" form to accommodate these restrictions by eliminating those duties they determined that Benninger would be unable to perform because of Flak's restrictions, as noted above. Benninger signed and dated the job description as having been fully read and understood by him. Franko also explained to Benninger that he would not be able to return to the night shift because the patients were for the most part in bed, and therefore much of the work on that shift consisted of repositioning and turning patients at intervals as they slept, assisting in the use of bed pans, changing bed clothes, and diapers and getting them up in the morning, that given his limitations, he would have too little work to do. Franko told him that it was only on the morning shift, from 7 a.m. to 3 p.m., that these restrictions could be accommodated. Benninger complained that he was not a "morning person" and, moreover, was entitled, as a matter of right under article 19 of the existing collective-bargaining agreement, to return to the same shift he had left. Article 19 is captioned "UNPAID LEAVES OF ABSENCE." Article 19.6 reads:

> The Employer shall endeavor to temporarily replace an employee on leave of absence. An employee returning from a leave of absence of nine (9) months or less duration will be placed in the same classification and same number of hours as they held prior to the leave, and the same shift that the employee was working at the commencement of the leave of absence.

Benninger was to have returned to work on August 10 on the morning shift, but on Saturday, August 8, he spoke to John August, union president, who advised him that he had a contractual right to be returned to the night shift. Thus it was that he did not return to work on August 10, but rather appeared at the facility on that date at about mid-morning with Mazione and Union Delegates CNAs Audrey Russell and Bonnie Decker. They met with Connery and Franko in Connery's office to discuss the matter. Connery explained that there was more supervision and more jobs that Benninger could perform on the day shift when the patients were awake that did not require the moving of patients in their beds or getting them up in the morning. Mazione argued that Benninger was entitled to return to the night shift as a matter of right under section 19 of the contract. With respect to article 19.6, Connery took the position that it applied only to nonwork related illnesses and went on to explain various distinctions making section 19 inapplicable to employees returning from workman's compensation disabilities. The meeting ended without agreement.

On August 12, a grievance was filed by the Union stating:

> The Employer violated the contract including Article 19.6 and 28.1 by not scheduling Charles [Benninger] for work on his assigned shift when Dr. released him for light duty & by scheduling him on the heavy care unit day shift to be a counted as a regular and placing other aides at risk.

The "Remedy" section recites "Schedule Charles on 11 to 7 shift light duty as an extra aide." The grievance was denied by memo dated August 18 from Franko reciting: "Article 19.6 Charles was not on Leave of Absence. Article IV Management Rights--a, d, k and q. Remedy: Denied." This position was further articulated by Connery in response to the second step of the grievance procedure by letter to Mazione dated September 15, reading, in relevant part:

> Mr. Benninger has failed to return to work from an occupational related accident. Mr. Benninger was released by his physician with restrictions. Accordingly, the facility offered Mr. Benninger a "light duty" position to accommodate his restrictions. Mr. Benninger failed to return to work as scheduled, 7:00-3:00 shift on August 1 I, 1992. Mr. Benninger was not on a medical leave of absence. Traditionally, medical leave of absences apply to non-occupational related illness-accident. Article 19.6, of the present labor agreement refers to a medical leave of absence due to non-occupational related illness/accident. Therefore, article *19.6,* has

> not in the past applied to absences due to occupational related reasons.
> Based on the above, the grievance is denied.
>
> I would urge you to contact Mr. Benninger and inform him to return to work as previously instructed.

It appears that Benninger was not the only light duty employee reassigned to a different shift on a return from a workman's compensation disability. Connery testified, and the record supports the testimony, that Bonnie Decker, Kathy Stark, and Betty Smith were all employees who were moved from shifts they had previously worked to other shifts in order to accommodate the restrictions of their light duty status on returning from a workman's compensation disabilities. No grievances were filed in any of those instances.

After the grievance was denied on September 15, Benninger was advised by August that he should go back to work. To this end, by letter dated September 22, Connery requested Flak to submit an updated "Light Duty Return to Work Certificate," "Order for Medical Treatment," and a "Nurses Aide Light Duty Job Description." When the documents were returned by Flak on or about September 28, the job description limited pulling and pushing to 25 pounds and further providing no rolling, lifting, pulling, or pushing of patients. A notation at the bottom of the certificate reads:

> Mr. Benninger should not change or bathe the patients. He should not attend any patient who is overactive, unruly or needs sedation or any other type of restraint.

On receiving this information from Flak, Connery and Franko drew up a longhand list of duties that they felt Benninger would be able to perform consistent with the limitations set out by Dr. Flak.

On October 8, this modified light duty list was reviewed with Mazione and Benninger. Benninger agreed that he was able to perform those duties. Connery gave Benninger a typed list of those duties captioned "Modified Light Duty Job Description" for him to clear with Dr. Flak.

On October 12, Benninger returned to the facility with the list of duties approved by Dr. Flak and spoke to Franko. They discussed creating various shifts to accommodate his limited duties. Benninger rejected 9 to 5 as "too early," similarly from 10 to 6, but agreed to a broken shift from 12 a.m. to 8 p.m. shift.

2. Discussion and analysis

a. *Refusal to furnish information*

Existing Board and court law make it clear that an employer is obliged to provide to the union, on request, that information that is necessary in order for the Union to perform its statutory duty as the collective-bargaining representative of the employees. With respect to the matter of grievances, an employer is obliged to furnish to the Union that information necessary and relevant to the processing of a grievance. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967).

In the instant case, the information sought was "A copy of the letter(s) sent to the Department of Health on the alleged abuse of Lee Adams on May 31, 1992." The question, therefore, is whether or not letters sent to the Pennsylvania

State Department of Health were necessary and relevant to the Union's function in processing the grievance.

Respondent takes the position that it has substantially complied with the Union's request for information by providing it with the results of the investigation in the form of statements taken from the various witnesses. The question is whether or not the correspondence between the facility and the State,[112] which included Gilpin's disciplinary memorandum, was necessary or relevant to the Union in the processing of a grievance on behalf of Bush. 1 believe that the information should have been provided.

First, there has been no showing of any prohibition in state or Federal law that would have precluded the disclosure of the information sought. Second, while Respondent contends that it did, in substance, provide the Union with the entire results of the investigation, it did not provide the report that

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[112] The full reporting requirements of the State are set out in the "Long Term Care Provider Bulletin #22. Nurse Aide Abuse, Neglect, Misappropriation of Property." This bulletin requires the facility, inter alia, to "2. Conduct an investigation of the alleged incident. Please complete the attached report" and thereafter to submit the report to the Department of Health Field Office "within five days of the completion of the investigation." The report list various specific questions followed by spaces for responses by the Facility, including the following: *"Findings," "Conclusions," "Facility Plan of Actions," "Describe* the problem, including names, places, dates, times, etc." and *"Methodology-Review* of records, observation and interview of resident(s), staff members, accused nurse aide, witnesses, family members, visitors, etc. Attach supportive documentation to this report (e.g., all witness statements, statement of accused aide, appropriate medical records, incident reports, etc.) It is extremely important that the facility interview all witnesses and obtain signed witness statements whenever possible. If statements are not obtained, please give reason(s). Please provide the Department with the names of all witnesses as well as their statements."

it provided to the State. Although Respondent contends that the undisclosed material was "confidential," I do not agree. In my opinion, Respondent was obligated to disclose the information to the Union. The entire report, including Gilpin's disciplinary action, was certainly germane and relevant to the incident and full disclosure would include that material. Accordingly, I conclude that Respondent's failure to furnish the report violates Section 8(a)(5) of the Act.

b. Refusal to return Benninger to night shift

In order for the General Counsel to prevail, it must establish that Benninger was engaged in union or protected activity and that Respondent discriminated against him for having engaged in that activity. With respect to the question of discrimination, the record discloses that Benninger was absent from work due to a work-related workmen's compensation back injury incurred while lifting a patient. It is undisputed that when he first returned to work on August 7, he was not allowed by his doctor to perform the full range of duties normally required on the night shift and that he would be allowed to return only in a light duty status with restrictions as set out by Dr. Flak. Briefly, these restrictions exempted Benninger from any lifting, pulling, or pushing over 35 pounds and prohibited any lifting, rolling, pulling, or turning or pushing of patients. A "Nurses Aide Light Duty Job Description" was modified to accommodate Benninger's physical limitations. This made his reemployment on the night shift difficult, as it appears that on that shift, the patients are sleeping and more patient moving and turning work is done on that shift than on the other two shifts when more of the light duty work described in Benninger's modified light duty job description are available. This is especially true in the

morning when patients are aroused for morning care and breakfast, beginning about 5 a.m.

Benninger, however, was unwilling to accept assignment to any shift except the one he had worked prior to his injury. He explained that he was not a "morning person" and that article 19.6 of the contract required Respondent to return him to the shift that he was working at the time of the injury. I do not agree. Any reasonable interpretation of article 19.6 makes it clear to me that it was not designed to require Respondent to return employees to the same shift even when returning to work in a light duty status and unable to perform major elements of the work done on that shift. It would defy common sense to allow employees to return to work with restrictions in a light duty status and require the employer to return them to shifts when, for the most part, they would have been unable, because of the restrictions, to perform the work necessary to be done on that shift. In the instant case, such an interpretation would have required Respondent to employ Benninger on the night shift when he could not perform most of the work being done, leaving him with less that he was able to do, whereas assignment to another shift would allow him to perform more of the duties his light duty status would allow him to do. Moreover, this approach had been applied in the past to other employees, as set out above, without grievances being filed.[113]

In applying a *Wright Line*[114] analysis to the facts of this case, I conclude that the General Counsel has not shown that

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[113] Obviously, other considerations might apply if the returning employees were certified as able to resume unrestricted employment.

[114] 251 NLRB 1083 (1980).

Benninger's union activity, although extensive, was a motivating factor in the Respondent's decision to refuse to allow him to return to his previous shift, and even assuming that such a showing had been made, the Respondent has sustained its burden of demonstrating that Benninger would have been treated in the same fashion, regardless of his union activity.[115]

Thus, I conclude that Respondent did not discriminate against Benninger in refusing to allow him to return to work on the night shift in violation of Section 8(a)(3) of the Act and, accordingly, I shall recommend dismissal of this allegation.

U. *Stroud Manor, East Stroudsburg, Pennsylvania*

Statement of the Case

The complaint alleges that Respondent, at its Stroud Manor facility in East Stroudsburg, Pennsylvania, violated Section 8(a)(l) of the Act by soliciting employee complaints, threatening employees, and promising benefits and improved terms and conditions of employment to Respondent's employees if they rejected District 1199P, National Union of Hospital and Health Care Employees, SEIU, AFL4210 (the Union), as their collective-bargaining representative; promising to redress an employee's grievance concerning tuition reimbursement; threatening employees with less favorable working conditions if they selected the Union as

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[115] Although it is true that Benninger, among others, received disciplinary warnings on July 18, 1991, I cannot conclude that these actions of Respondent, over a year earlier, require a different result.

their bargaining representative; threatening employees that Respondent would no longer grant favors if the employees selected the Union as their bargaining representative; and threatened employees with less favorable working conditions if they selected union representation by telling the employees that an entire day must be requested if the employee has a medical appointment during the workday.

The complaint further alleges that by withholding an anniversary wage increase from employees, Respondent violated Section 8(a)(1) and (5) of the Act.

Facts, Analysis and Discussion

1. The 8(a)(l) allegations

In the spring of 1991, the Union began a campaign to organize the approximately 11 licensed practical nurses (LPNs) at Respondent's nursing home facility in East Stroudsburg, Pennsylvania. A few weeks prior to the election on August 2, 1991, Jay Begley and Greg Thomas, human resources representatives of the Respondent, were assigned to the facility to assist management at the facility during the preelection antiunion campaign. After the election, they departed. The Union won the election and was certified as the collective-bargaining representative of the LPN unit on September 4, 1991.

Thomas testified that in presenting management's position to the employees, it was his practice to consult individually with the LPNs. He testified that he would introduce himself to the employee and explain that his purpose was to explain management's position, encourage them to vote, and encourage them to see him if they had any questions about the campaign or anything else. Thomas testified that this

approach was consistent with his approach at all the facilities in the ongoing process of determining job satisfaction.

In about mid-July, Thomas spoke individually to Jeanette Drake, a LPN. According to Drake, he asked if she had any questions. She raised the matter of an excessive time lag in the Respondent's tuition reimbursement program, complaining that while it was the policy to reimburse within 8 to 12 weeks, it was taking 16 to 20 weeks. Drake further testified that Thomas said that he would see what he could do about it.

Thomas concedes that Drake asked him about her problem with reimbursement for her tuition costs and explained to her that the delay might be caused by Respondent's poor financial condition. Thomas testified that he may have told Drake he would look into it for her, but has no recollection of doing so except to the extent that he may have mentioned it to Mary Lou Shannon, the administrator at the facility.

Drake testified that on the following day, she was approached by Shannon who engaged her in conversation about the delay in Drake's tuition reimbursement.[116] According to Drake, Shannon said she had heard about the prolonged delay and agreed to look into it for her. Shannon confirms the substance of the conversation and testified that she did look into it for Drake and learned that her tuition reimbursement check had been processed and that Drake

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[116] Although Shannon testified that the employee came to her, I credit Drake's more detailed account of the circumstances, despite the fact that Drake was subsequently discharged by Respondent. Drake would have little to gain from the finding of a violation in the instant case and, in my opinion, Drake was not retaliating out of hostility.

would get it within a couple of weeks and she told this to Drake. Shannon testified that on two prior occasions, Drake had raised the tuition reimbursement problem with her, first in 1988. She had also on those occasions looked into it for Drake, and Drake confirms that Shannon had acted on the problem for her in the past.

On July 30, a meeting of the LPN employees was conducted by Begley. The meeting opened with a showing of a pro-Employer film clip. After that, there was distributed to those LPNs present a LPN wage benefits charge ostensibly comparing the wages and benefits at Stroud Manor with the wages and benefits of five Beverly facilities represented by Local 1199. Begley went through an explanation of the comparisons, followed by questions from some of the LPNs about the benefits. Drake, still concerned about reimbursement for tuition costs, asked about the delay in receiving tuition reimbursement checks. She also asked for an explanation of how vacation time was accrued. Begley attempted to explain how vacation time was accrued. According to Drake, whose testimony is substantially corroborated by another LPN, Evelyn Jiminez, Begley told her, regarding the matter of the tuition reimbursement, that the Company had been having some financial difficulties but that conditions were becoming more stable, and the delay in reimbursement would improve.

With respect to the 8(a)(1) allegation that Thomas unlawfully solicited grievances in a one-on-one conversation with Drake, it appears that while soliciting a grievance, standing alone, is not unlawful, it raises a rebuttable inference that promises to correct the grievance are being made that violated Section 8(a)(l). *Uarco, Inc.*, 216 NLRB 1 (1974). In the instant case, not only was the inference raised by Thomas that the grievance would be corrected, Drake was given

assurances that Thomas would himself make an effort to rectify the problem. This response negates Respondent's position that the unlawful inference has been rebutted. Nor do I conclude in the circumstances of this case, during an election campaign, that the record is sufficient to support the conclusion that the inference of illegality has been rebutted by Respondent's past practice in conducting individual interviews as a part of its employee relations program.

With respect to the 8(a)(1) allegation involving Shannon's conversation with Drake, I conclude that Shannon did seek out Drake and told her that she would look into the delay in her tuition reimbursement and, in fact, did so. She learned that Drake would be reimbursed within a week or so, and so advised Drake. In these circumstances when Drake was approached by Shannon during the election campaign with a promise to expedite this payment, such remarks violate Section 8(a)(1) of the Act.

Similarly, when Begley, on July 30, represented to the LPNs that the delay they were experiencing in tuition reimbursement would improve, he was promising a benefit to these employees that interfered with the employee rights set out in Section 8(a)(l) of the Act.

Shannon testified that during the preelection period, she drafted and distributed campaign material for Respondent. This included a letter dated July 23, captioned "THINK ABOUTS" and mailed to the LPNs, which reads:

> Fact! Under current union contracts that are in force there are to be no individual agreements. Contracts state that only by mutual agreement of the union and the company can the employer/employee make an arrangement that would conflict with the agreement.

What is an individual agreement? Ask the LPN who needed to reduce her hours of work for personal reasons. Did the employer arrange a schedule to meet her needs? The answer is "YES." And, when she found she could resume a normal schedule, was she given back the day she'd given up? The answer is "YES." Was the employer required to do this? The answer is "NO."

An LPN is attending school and can't always make it to work at her scheduled start time. Has the employer allowed this to interfer [sic] with her employment? Has the employer accommodated this lateness? The answer to the first question is "NO" and the answer to the second question is "YES." Is the employer required to do this? The answer is "NO."

Policy addresses how requests for days off are to be made. Have requests by LPN's for a day or days off always been made per policy? The answer is "NO." Have such individual LPN requests been accommodated by the employer? The answer is "YES." Is this an individual agreement? The answer is "YES." Is the employer required to grant untimely requests? The answer is "NO."

If an LPN has had misfortune of health problems and needed leaves and absences above and beyond that normally permitted by policy, has the employer accommodated the LPN? The answer is "YES." Is this an individual agreement? The answer, again, is

> "YES." Is the employer required to do this? The answer is "NO."
>
> These are but a few of the individual agreements that have been made on behalf of LPN's and exceeded that which the employer is required to do.
>
> Vote NO on August 2, 1991.

It is undisputed that the individual accommodations made in the letter refer to individual employees. For example, the fourth paragraph therein refers to an accommodation made for a LPN named Evelyn Jiminez who, because of serious health problems, required more time off than normal. It appears that Jiminez has taken several leaves of absence and requires time off for doctors' appointment and medical needs that exceed the provision for allowable absenteeism as provided for by company policy.

In another incident related to Jiminez' physical condition, Val McGonnigle, DON, testified that on or about August 1, 1991, Jiminez came to her with a note for a doctor's appointment on the following day. At that time, according to McGonnigle, she told Jiminez that it would be better for her to make doctors' appointments on her days off. According to Jiminez, she was told by McGonnigle that it would be necessary for her to take a day off to have a doctor's appointment. When Jiminez explained that the doctor's office was not open except during the hours she was working, McGonnigle agreed that the appointment should be kept. McGonnigle and Jiminez testified that Respondent continued to accommodate Jiminez in taking time off in excess of the norm, as it had been done in the past.

The General Counsel contends that Shannon's July 23 letter constitutes an unlawful threat of less favorable working

conditions if the employees selected representation by the Union. In my opinion, the letter is not such a threat. As a matter of law, once a union is certified as the collective-bargaining representative of the unit of employees, an employer is no longer free to deal with those employees on an individual basis. Indeed, to do so would violate Section 8(a)(5) of the Act. The July 23 letter essentially recites that proposition, and cites examples of how certain needs were met and employees accommodated on an individual basis and exhorts employees to vote against the Union. While the letter may promote the Respondent's campaign objectives, it is not an unlawful threat within the meaning of Section 8(a)(1) of the Act.

The General Counsel contends that Shannon's July 23 letter constitutes a threat of less favorable working conditions if the employees selected representation by the Union. In my opinion, the letter is not such a threat. As a matter of law, once a union is certified as the collective-bargaining representative of the unit of employees, the employer is no longer free to deal with those employees on an individual basis except as they may mutually agree under the contract. Indeed, to do so would violate Section 8(a)(5) of the Act. All the July 23 letter does, in essence, is to make that observation and to cite examples of how certain needs were met in the past and how employees had been accommodated on an individual basis and exhort employees to vote against the Union. The implication to be drawn from the letter is that once the Union represents them, the employer will no longer be able to deal with employees individually, except with the agreement of the Union. This is an accurate observation, and while it may promote the Respondent's campaign objectives, it is not an unlawful threat within the meaning of Section 8(a)(1) of the Act.

The General Counsel also alleges McGonnigle unlawfully threatened Jiminez with less favorable working conditions by telling her she must take an entire workday off for a medical appointment. I have reviewed all of the relevant testimony in the record and I conclude, crediting McGonnigle, that no such threat was made. This was simply an effort by McGonnigle to see if Jiminez could arrange her doctor appointments so as not to break up her shift. When it appeared that such arrangements were not feasible, the matter was dropped. Despite the fact that an election campaign was in progress, nothing in the record relates this conversation with the Union. In these circumstances, there was no interference with the Section 7 rights of employees.

Jiminez also testified that on about July 26, curious about whether or not LPNs had to do NA's work at the Respondent's facilities where the LPNs were represented under a contract, she asked to see union contracts. In reviewing one of the contracts, Shannon said that overtime would no longer be random, but would be determined by seniority. According to Jiminez, while looking at the contract, Shannon also stated that under the contract, personal favors could not continue to be done.

On August 2, according to Jiminez, Shannon approached her before the election and congratulated her for the way the nursing staff had maintained patient care during the election campaign. Jiminez told Shannon that no matter how the vote came out, she hoped it would not affect their relationship and Shannon, in an apparent reference to the July 23 letter, implied that if the Union were voted in, it would not affect anything, just that personal favors could not continue to be done.

The General Counsel contends that Shannon, in her conversations with Jiminez on July 26 and August 2, violated

Section 8(a)(l) of the Act by telling employees they could no longer expect favors to be done for them if they selected union representation. I do not agree. As noted above, I have concluded that Shannon's letter of July 23 did not violate the Act as it was merely an accurate observation of the valid legal proposition that once a union has been selected as the collective-bargaining representative of employees, the employer may no longer deal with them as individuals on matters concerning their terms and conditions of employment. The observations made by Shannon in conversation with Jiminez while reviewing a union contract on July 26 and in discussing the ramifications of the unionization of the facility on August 2, were nothing more than expressions of the same concept and did not constitute interference with the employee rights afforded under Section 7 of the Act.

2. The 8(a)(5) allegation--withholding wage increase

After the Union was certified to represent the LPN unit on September 4, the parties began contract negotiations once or twice a month through April 1992, when a contract was signed. During these contract negotiations, Daniel Plott, Regional Director of Human Resources, negotiating the contract for Respondent, was asked about a wage increase for 1992. This prompted Plott to ask Shannon about the history of wage increases at the facility. According to Shannon, the raises given to LPNs were totally within her discretion regarding the amounts and timing, and granted or not granted based on the financial health of the facility on an individual facility basis.

Whereupon Plott, determining that there was no pattern of wage increases at the facility for the LPN

employees, wrote to John August, president of the Union, a letter dated February 12, 1992, stating:

> As a follow-up to discussions on 1992 wage increases for Licensed Practical Nurses at Stroud Manor, please be advised 1992 wage increases will be withheld pending the outcome of the collective bargaining process. The decision to withhold wage increases of LPN's at Stroud Manor is predicated on the fact that the facility has had no standard practice of granting wage increases.
>
> Should you have any questions, please feel free to contact me.

On March 25, 1992, at the request of Mazione, Shannon sent a list of annual raises for those LPNs employed, from the dates of their hire through March 25, 1992. It appears that all received annual wage increases on their anniversary dates although the amounts of the raises varied, with the exception of 1990 when two wage increases were granted, apparently because a contractual wage increase had been given to NAs in that year.

In my opinion, the withholding of all wage increases for the year 1992 without notice to the Union violated Section 8(a)(5) of the Act. The facts disclose that prior to the certification, except for 1990, wage increases in varying amounts were given to the LPNs on their anniversary dates. The amounts varied, but the process of selection was not random and all received raises, at least annually. After the certification, Respondent was obliged to bargain with the Union on all matters concerning the working conditions of the employees, including wages. Withholding all raises to unit

employees, in contravention of its practice in previous years, is tantamount to a change in the working conditions of unit employees, by withholding an annual wage increase, without notice to or consultation with the Union, and violates Section 8(a)(5) of the Act.

V. *Valley Care and Guidance Center, Fresno, California*

Statement of the Case

The complaint alleges with respect to the Valley Care facility, that Respondent unlawfully interfered with the 8(a)(1) rights of employees to form, join or assist the Union, as set forth therein.[117] It is further alleged that following a strike[118] on December 7, 1991, Respondent discriminatorily refused to reinstate employees Samuel Orozco and Martha Orozco in violation of Section 8(a)(3) of the Act. Further, it is alleged that Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and by refusing to furnish certain classifications of information to the Union.[119]

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[117] Par. 2 of the complaint was amended at the hearing to allege Bill Pinheiro as a supervisor and add two additional 8(a)(l) allegations as (i) and (j). Par. 2 was also amended at hearing to delete the 8(a)(l) allegations in pars. 2(c) and (e).

[118] Although the strike is alleged in the complaint as an unfair labor practice strike, the General Counsel withdrew that contention at the hearing.

[119] That portion of par. 8 of the complaint alleging a refusal to furnish "Cost Information" was withdrawn at the hearing.

A hearing was held before me on August 12-14, 17-18, September 30, and October 1, all in 1992.

Facts, Discussions, and Analysis

1. Withdrawal of recognition by Respondent and refusal to furnish information

For many years, the Union has represented under contract an overall unit of about 60 service and maintenance employees at Respondent's Valley Care facility, including NAs, CNAs, housekeeping, laundry, and kitchen employees, but excluding LVNs and RNs. The most recent contract was effective September 1, 1989, through September 1, 1991.[120]

In early 1991, Helen Williams, an activities assistant, covered by the bargaining unit, became dissatisfied with the representation being provided by the Union. Specifically, she testified that she got no satisfaction concerning complaints to her shop steward about reductions in overtime. She was also unhappy about dues increases and her perception of the Union's position on wage increases. Thereupon, she went to Carolyn Hankinson, the administrator, to inquire about getting rid of the Union. This inquiry prompted Hankinson to call Rod Panyik, director, human resources, to obtain that information. In March 1991, Panyik responded by letter to Hankinson containing two basic options, first, withdrawal of recognition after a decertification election, and second, withdrawal of recognition based on "objective considerations" that a majority of employees no longer desire representation by the Union. Sometime in April, while in Hankinson's

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[120] All dates refer to 1991 unless otherwise indicated.

office, Williams asked if she had obtained any information. Hankinson said she had and explained the two options outlined in Panyik's letter. Hankinson explained that Williams would need 50 percent of the unit employees to sign a decertification petition in order to withdraw recognition, or 30 percent to obtain an election. Hankinson also copied and gave to Williams that page of the letter from Panyik containing, inter alia, suggested decertification petition language, to wit:

> We, the undersigned associates of [name of facility] no longer wish to be represented for the purposes of collective bargaining by [name of union].

They met again during the first week of May, in Hankinson's office. Hankinson testified that Williams told her that she had decided to circulate a petition, but was concerned about the reaction of the unit employees. She asked Hankinson for her support. Hankinson testified that she agreed, assuming that Williams meant moral support, but told Williams that she could not use any company property, such as a typewriter, to promote the effort. Williams testified that she had lost that page of Panyik's letter containing the decertification petition language and asked Hankinson for another copy, which she provided. They also discussed the possibility of having each employee sign individual decertification petitions and Williams did, in fact, adopt this manner of solicitation. The petitions were then circulated by Williams between approximately May 17 and 31, yielding 33 signed petitions, all bearing the identical language that appeared in Panyik's

letter to Hankinson.[121] It is undisputed that during the time the petition was being circulated, Williams received about four to seven rides to and from work from Hankinson and others because her own car was disabled.

On May 31, Williams was getting a ride home from Hankinson. Sometime after 4:30 p.m., as they were driving, Williams asked Hankinson to pull off the road into a residential area. Hankinson testified that, without inquiry, she did so. Williams then left the car and went to the house of Margaret Valdez, a CNA at the facility. Williams solicited Valdez to sign the petition "to get rid of the Union." When Valdez declined, Williams asked her to come to the car to speak to Hankinson. At the car, Hankinson explained that the paper was a petition to get rid of the Union and, again, Valdez refused to sign. Hankinson went on to say that the Union was not doing anything for her at all and that they wanted the Union out of the facility. Hankinson also said that the Union only wanted her dues money and asked why she would not sign the petition and that it would be confidential. Hankinson told Valdez that all they needed was one more vote to get the Union out of the facility, but Valdez continued to balk. Hankinson and Williams concluded by asking Valdez to let them know if she ever changed her mind. Accounts of this conversation were factually inconsistent in their particulars. Hankinson and Williams, while conceding that a conversation between Hankinson and Valdez took place, both testified that it was limited to an exchange of pleasantries; that Hankinson made no effort to solicit Valdez to sign a decertification

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[121] Williams, during her testimony, admitted that she had lied in a sworn affidavit to a Board agent stating that she and a girlfriend came up with language used in the decertification petition.

petition. Having reviewed the relevant testimony, however, I am persuaded that Valdez's account, including solicitation by Hankinson, is credible.[122]

On the following day, June 1, Williams delivered the de-certification petitions to Hankinson in her office.

After consulting her superiors, Hankinson, by letter dated June 3 to Michael Guidry, Commerce Business Representative, withdrew recognition from the Union. The letter reads:

> We are in possession of objective evidence that your union no longer represents a majority of our employees in the bargaining unit here at Valley Care & Guidance Center. Accordingly, we hereby withdraw recognition from your union effective September 1, 1991, the current contract's expiration date. Of course, we recognize your right to administer the existing collective bargaining agreement until its expiration date.

By letter dated May 21 to Hankinson from Union President Sal Rosselli, the Union had requested certain information in order to prepare for negotiations. The specific requests are set out in the complaint.[123]

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[122] Williams' credibility was reduced by the lie that she swore to in an earlier affidavit, as noted earlier, and clearly, Hankinson had an obvious personal interest in providing an account absolving her from any participation in the solicitation of the decertification petitions.

[123] As noted above, the allegation concerning "Cost Information" was withdrawn at the hearing.

By letter dated June 6 from Panyik to Guidry, the Respondent declined to furnish that information. The letter reads:

> We are in receipt of Sal Rosselli's letter dated May 21, 1991, requesting information in preparation for upcoming negotiations at the facility. As you were notified by the administrator in this facility, the facility is withdrawing recognition from your Union in light of the amply-supported, good faith doubt of your Union's continued majority status. Since we will not be negotiating a new Collective Bargaining Agreement with your Union at this facility, your information request is moot.

It is well established, as a matter of Board and Court law, that an employer may not assist, promote, or encourage the circulation of a decertification petition. When the employer engages in such conduct, the petition is thereby tainted and insufficient to support any withdrawal of recognition.

In the instant case, although Williams may have initially inquired about how to rid the facility of the Union, it was Hankinson who thereafter took it upon herself to obtain the information for Williams, including the exact language of the petition, discuss the options and agree to "stand by" Williams during the process. Hankinson also provided Williams with copies of a page from the letter Panyik had sent to her, which, in addition to the language of the petition, outlines the "basic procedures for terminating the Union's representative status."

Hankinson also drove Williams to the home of at least one employee, Valdez, and assisted in attempting to solicit Valdez to sign a decertification petition.[124] In all these circumstances, it is clear that Respondent's assistance in the de-certification was crucial. Without Hankinson's assistance and support, it is my opinion that the decertification petition would not have been circulated. The process was not lawful and the petition was invalid and inadequate to support Respondent's asserted good-faith doubt of the Union's majority status based on objective considerations. Accordingly, withdrawal of recognition from the Union was unlawful.

Also, because Respondent's withdrawal of recognition was unlawful, it follows that the Union continued to enjoy majority status as collective-bargaining representative of the unit employees under contract, and its refusal to provide the information requested by the Union was unlawful in violation of Section 8(a)(5) of the Act.

2. The 8(a)(l) allegations

As set out above, I have concluded that on May 31, Hankinson and Williams went to the home of Valdez where both, apparently without success, solicited her to sign a petition to decertify the Union. Such solicitation by Respondent, through Hankinson, is clearly interference with

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[124] Respondent contends that even crediting Valdez, more than 50 percent of the unit employees had signed decertification petitions before Valdez was solicited. The record does not support this contention, however, in view of the fact that three were undated and seven were dated May 31, the same day that Valdez was solicited.

the rights of employees under Section 7 of the Act in violation of Section 8(a)(l) of the Act.

On June 3, the same day that Hankinson sent the letter to the Union withdrawing recognition, three employees, Linda Celano, Janice Angell, and Williams, were discussing rumors they had been hearing to the effect that their wages were going to be reduced by the $2 per week being deducted from union dues and that they would get less overtime. Williams led them to Hankinson's office and, in a discussion in the lobby outside her office, Hankinson explained that it was the intention of the Respondent to adhere to the present contract with the Union until it expired on September 1, 1991, and that rumors about reductions in overtime wages and discharges were unfounded. According to Hankinson, she also explained how overtime worked, outlined the disciplinary procedures, and told them that Respondent could not lawfully deduct any money from their wages. It appears that Hankinson took contemporaneous notes of this meeting that support her testimony and appear in evidence (G.C. Exh. 12).

According to Celano, they were told by Hankinson that overtime would not be a problem without the Union and, inferentially, that without the Union, she would be able to get employee raises.

Having carefully reviewed the relevant testimony, I am not satisfied that the evidence supports the 8(a)(l) allegations about this incident, particularly in view of the corroborating testimony of Hankinson and Williams as well as Hankinson's notes. Angell did not testify. It appears that Hankinson was simply responding to calm the fears of the employees about the uncertain situation that existed and was not promising wage increases or overtime if the Union no longer represented them, and Hankinson made it clear that Respondent, despite

its withdrawal of recognition, still intended to observe the terms of the contract until its expiration.

On June 19, Guidry went to the facility on a periodic visit. After advising the charge nurse of his presence, he went to the breakroom where he spoke to employees as they came in and out. Guidry recalls lengthy conversations with some two to four employees in a visit lasting from about 8:45 to 12:15 p.m. Guidry testified that during this time he observed Hankinson sitting at a table in the corridor outside of the breakroom door, some 6 to 10 feet from the door. According to Guidry, she was not at the table when he arrived and that it was at least a half hour until he saw her. Thereafter, he saw her three or four times at the table during his stay in the breakroom, at times when the door was open. Guidry testified that he stayed as long as he did only to make Hankinson "sit around for a while." Hankinson testified that she had returned to the facility that evening to work on a report and to distribute paychecks to afternoon and night-shift employees. She testified that she saw Guidry twice, once when he stepped out of the breakroom and again as he was leaving. Hankinson testified that she sat at a table across from the breakroom door with Georgia Ginder, a CNA, for about 5 minutes, chatting and passing out paychecks. Thereafter, according to Hankinson, she returned to her office and next saw Guidry as he was leaving, when they exchanged pleasantries. Hankinson remained working at the facility until about 2 a.m. Ginder testified that she came to the facility about 10:30 p.m. and that she sat charting patients' records at a table located across from the break room door. About 11:15 p.m., Hankinson came by the table and gave her a paycheck. Hankinson stayed at the table for a while talking and left while Ginder was still at the table. Ginder corroborates Hankinson's testimony about the incident, and that Hankinson came to the facility during the

night shift two or three times a month to distribute paychecks to night-shift employees.

The General Counsel alleges that Hankinson engaged in unlawful surveillance of the union activity of employees, apparently by positioning herself at the table outside the breakroom door to observe which employees spoke to Guidry. I cannot conclude, however, based on this record, that Hankinson was so engaged. The mutually corroborative testimony of Hankinson and Ginder disclose that Hankinson was only at the table for a short while, either distributing checks or chatting with Ginder. Even Guidry, the General Counsel's only witness to this incident, testified that he can only assume that she remained at the table in a position to engage in the alleged surveillance, based on only seeing her three four or times when the breakroom door opened. This evidence is insufficient to establish the 8(a)(1) allegation of unlawful surveillance.

On or about June 19, Jim Thompson, a CNA and union shop steward, requested that Hankinson initial, for posting, a union pamphlet captioned "Your Right--Representation," setting out the Union's view of the rights of a union employee called to meet with a supervisor or administrator. It is undisputed that Hankinson, after consulting her attorney, refused to post the notice, telling Thompson that she had been advised not to post it because it had an inflammatory message. Article 4.4 of the contract reads:

> *Section 4.4.--Bulletin Boards*
>
> The Employer agrees to allow the posting of Union material on designated and existing bulletin board space. Such Union

> material shall be limited to meetings and other official notices. All material to be posted shall first be initialed by the facility's Administrator, or his/her designee, and the Employer shall have the right to remove any material which has not been approved in advance or which has been posted in excess of two calendar weeks.

Because the parties have negotiated that provision, the initial question is whether or not the notice that Hankinson refused to post dealt with "meetings" or other "official notices." Clearly, the pamphlet did not deal with union meetings which, in my opinion, were not an "official notices." In essence, it was the Union's interpretation of what legal rights an employee enjoyed when called to meet with a supervisor of administrator, together with an exhortation to exercise those rights. Because the parties have contractually limited union bulletin board material, the refusal to post a notice that does not comply with the contract does not violate Section 8(a)(l) of the Act.

Samuel Orozco testified that on or about December 5, having detected a change in Hankinson's attitude toward him, he went to her office to discuss the matter. Orozco testified that he told Hankinson that he knew that she knew that he had joined the Union but that this should not affect their relationship. At this point, Hankinson shut her door and told Orozco that she was not aware that he had joined the Union and asked him several times why he had done that. When Orozco mentioned signing a union card, Hankinson responded that it didn't matter how many cards he or anybody else signed, they were "worthless" and did not mean anything any more. Orozco testified that at this point, Hankinson asked

Orozco to repay a $200 loan she had made to him,[125] but Orozco told her that he was unable to do so.

Hankinson testified that Orozco came to her office to pick up his paycheck and that Robert Worley, an employee of the State Department of Environmental Health Services Licensing and Certification who was reviewing State mandated strike contingency provisions, was also in the office.[126] According to Hankinson, she only asked Orozco to return a loan previously made to him on June 12 and that Orozco said that, because of his bills, he could not repay and then left and that there was no discussion about the Union at all. Worley testified only that while he was in the office, someone came in and that Hankinson gave the person something, and remarked to him that she could kiss that money goodby. In my view, having reviewed the relevant testimony, I am persuaded that Orozco's version of this incident should be credited. Although Worley may have been in the office he was occupied in reviewing the strike contingency plans. Concededly, he was unable to identify Orozco as the employee in the office, nor does the record even disclose that he heard the entire conversation so as to enable him to testify that Hankinson did not make the statements attributed to her. In these circumstances, I conclude that Respondent violated Section 8(a)(1) of the Act by interrogating Orozco concerning his union activities; by implying that the concept of union organization of employees

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[125] Orozco testified that Hankinson had previously lent him $200, saying he did not have to worry about repayment if he did not join the Union and that she did not want him to tell anyone about the money.

[126] The Union had called a strike for December 7.

was a futility; and by telling him that he must make immediate repayment of a prior loan, in retaliation for having joined the Union.

3. The 8(a)(3) allegation--discrimination--discharges of Martha Orozco and Samuel Orozco

Martha Orozco was employed by Respondent as a dietary aide and cook from January 1979 until she was discharged in December 1991. She was a shop steward for the Union and participated in negotiation of union contracts. She worked on the day shift from 6 a.m. to 2:30 p.m. It is undisputed that beginning December 7, 1991, Martha Orozco participated in a 1-day strike and picketing on behalf of the Union. The announced purpose of the strike was to protest Respondent's withdrawal of recognition and the perceived harassment of its members.[127] The strike lasted for only 1 day, December 7, beginning at 6 a.m. until about 3:30 p.m. On the same day, December 7, the Union notified the Respondent by letter that all employees who went on strike were offering unconditionally to return to work, effective immediately. Guidry testified that the decision to strike for only I day was because the Union "wanted to be disruptive to the facility and at the same time not injure our members by bringing them out on a long strike."

During the day on December 7, there were in attendance at the facility administrators from several other nearby Beverly facilities to assist in maintaining the operations at the facility. Among those administrators were Jewell Williams, Sarah Wobrock, and April Chrisman, all of whom

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[127] As noted above, no contention is being made that the strike was an unfair labor practice strike.

testified that on December 7, as they were walking inside the gates of the facility, they heard Sam Orozco call to them from outside the fence various sexually explicit remarks, such as "baby" and having "something to show you"; that he would give it to them "any way you want it" and "come sit in my lap, I have the in and out urge." This testimony was corroborated by the testimony of Joseph Munoz, another administrator, who testified that Sam Orozco said he would "light your fire" and that he was "the in and out man." According to Pinheiro, Orozco said to Chrisman, "look at me bitch, turn around" and "you know you want to." Orozco denied making any sexual suggestive remarks to females on December 7. The weight of the credible evidence, however, particularly from the administrator, convinces me that he did.

Helen Williams testified that on December 7, while she was taking a break about 9:30 a.m., Martha Orozco called out to her, saying, "that bitch, that orphan bitch is mine" and that she was returning to work tomorrow, and "her ass is mine." Although Martha Orozco generally denied making any threatening remarks to working employees, a review of the probative relevant testimony satisfies me that Williams' testimony is this regard is the more credible.

On December 8, about 5:50 a.m., Martha Orozco and Marty De Los Reyes, another cook, reported for work at the facility and went into the kitchen area. Hankinson came to them and told them that their jobs had been filled for their shifts on December 8 and that they should report to work on the following day.[128] They left the facility. Hankinson also

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[128] After having received the notice of the Union's intent to strike, Hankinson went about securing some 40 or 50 volunteer replacements from other nearby Beverly facilities to staff the various departments at Valley Care.

testified that on December 8, she called both Martha Orozco and De Los Reyes to advise them that she had "misspoken" herself and that because of commitments to their replacements, they were not to report on December 9, but rather were to report on Tuesday, December 10, and Thursday, December 12, respectively, at 6 a.m.

Jewell Williams was an administrator from another Beverly facility, Kings Vista, filling in at Valley Care to provide 24 hour a day coverage by administrators. Because Williams was working the night shift, Hankinson wrote her the following memo:

> Jewell
>
> Martha and Marty were accidentally told this morning to return to next scheduled day--Monday by me. I called them each back and clarified that they were to report:
>
> Marty 12/12 at 6 am Thur
> Martha 12/12 at 6 am Tue
>
> They were both upset and insistent that I told them Monday so they would be here Monday (12-9) @ 6 am. They also asked for this in writing. I refused. I did say they would be told this face to face in AM, if they wished.
>
> Please do this for me so I can sleep? If you don't want to, call me @ 4:30 am and I will come in and do it.

On the morning of December 9, shortly before 6 a.m., Orozco, De Los Reyes, and Maryl Arreola, a CNA, showed up at the facility where they were stopped by a security guard

at the wooden barricades and told that their names were not on a list of those employees scheduled to work that day and they were denied entrance. Jewell Williams came out and read to them a statement to the effect that they were to return on their next regularly scheduled workdays, December 10 for Orozco and December 12 for De Los Reyes. The entire statement read:

> We've made a commitment to other people to cover the shift therefore, we can't put you to work now because that slot is occupied. Are you available to work your shift on Monday (or Tuesday if day shift associate).

They asked to see Hankinson and were told that she was not there.

All three then left and went to Arreola's nearby home. Other employees came to Arreola's house, including Jim Thomson, a CNA, Betty Parker, a CNA, Samuel Orozco and Rosa Garcia, another employee. They decided to return to the facility again and to report for work at 7:30 a.m. Martha Orozco, Arreola, and De Los Reyes also were to try again to speak to Hankinson about why they had not been put back to work that day.

When they arrived at the facility, they again asked to see Hankinson but were told that she was not there. The names of Barker and Thomson were on the list and they were allowed to go to work. At this time, Samuel Orozco also learned that he was not on the list to work that day. Martha Orozco and Samuel Orozco became insistent about seeing Hankinson, who had since arrived at the facility, and asked the guard to call her. When she did not appear, Martha Orozco screamed for Hankinson "Carolyn, get your fucking

fat ass over here and talk to us" or they would drag her out, and that she had people coming in who would kill Hankinson and her family. Martha Orozco yelled to Pinheiro that she knew where his wife worked and when she got off work, she would be "dead" and his car burned. Pinheiro testified that he called his wife to warn her to get out of the house and go to her grandmother's house. Martha Orozco accused Milton Ford, assistant maintenance manager, of selling pot and threatened to call the police. She also said that they would bum Ford's car and house and hurt his wife.

Similarly, Samuel Orozco who also wanted to speak to Hankinson, began to yell for that "fat bitch" to come out and talk to him. He became angry, got into his pickup truck and drove to the middle entrance where he knocked down the wooden barricade, backed up, drove away, and parked across the highway. He returned to the main gate, continuing his harangue. Jewell Williams testified that Samuel Orozco called for Hankinson to get her "fat ass" out of the facility and threatened to kill Hankinson and her family.

A group of employees had now gathered outside of the facility in the parking lot. These included Pinheiro, Leon Hill, housekeeping superintendent, Jewell Williams, and Mike Peralta, a new employee. Hill testified that Samuel Orozco came across toward the facility yelling that he wanted to see Hankinson fight now or he was going in after her. He said that he knew where she lived and was going to "take care" of her family. Orozco said he was going to hurt Pinheiro's wife, calling her by her name, "Virgie." To Peralta he said that, although a new employee, he was "next." Pinheiro also testified that Samuel Orozco alluded to hurting his wife, and threatened to bum Ford's house down, and kill his girlfriend. He called Jewell Williams a "fat nigger," and told Hill that he knew where he lived and what he drove. Milton Ford and

Patricia Diaz, a housekeeping employee, also observed the scene and generally corroborated the testimony of Jewell Williams, Hill, and Pinheiro.

Concerning the events of December 9, Martha Orozco testified that when they returned for the second time to the facility about 7:15 a.m., they asked to speak to Hankinson. About this time, Pinheiro, Ford, and Hill came out of the facility and Ford said something like "the bitch is back." Orozco testified that she said, "yeah, and we want to talk to Hankinson." Samuel Orozco also spoke, telling them not to be calling his family or threatening them.[129] Martha Orozco does concede that when Hankinson did appear, she told her, "Carolyn, get your fucking ass over here and talk to us and let us know why you're not putting us back to work." She also concedes, as to Pinheiro, that she did say she knew where his wife worked, and what time she got off, but denies threatening either Pinheiro or his wife. Samuel Orozco denied using the word "bitch" in reference to Hankinson. He concedes that he used the word "bitch" but cannot recall to whom he was speaking. He denied using any profanity. Samuel Orozco testified that while he did see a group of people outside the building, he did not make the statements attributed to him, nor did he hear Martha Orozco make any threatening or abusive remarks. He did admit that he was so angry when he left the facility that De Los Reyes had to drive his truck home for him.

De Los Reyes testified that both Samuel Orozco and Martha Orozco told Hankinson to stop "messing" with their

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[129] Orozco testified that his brother and mother had told him that "someone" had telephoned their home making threats and obscene remarks.

families. She also testified that while Martha did address some remarks to Ford and Pinheiro, but not to Hill or Jewell Williams and that she could not recall any threatening or abusive remarks toward anyone's personal property, either by Martha Orozco or Sam Orozco. Arroyo's testimony generally supports the testimony of De Los Reyes and that she either could not recall any threatening remarks or could not recall anything being said by Sam Orozco or Martha Orozco.

Having reviewed all the relevant testimony, I am satisfied, despite the somewhat disjointed and confusing testimony, that those accounts offered by the Respondent's witnesses were more credible. To the extent that there exist inconsistencies between their accounts and the accounts of others, I credit their accounts. Specifically, I conclude that this record supports the conclusion that Samuel Orozco and Martha Orozco, angered by not being able to return to work on December 9, became angry. This anger manifested itself in certain identifiable misconduct, namely, threats to the person and/or properties not only of Hankinson, but Pinheiro, Hill, Ford, and Peralta. In addition, Samuel Orozco made sexist, racist, and intimidating remarks to Jewell Williams on December 9 and to other female administrators on December 7. Viewed in its totality, 1 am satisfied that the threats of physical harm to Hankinson and others, together with the other misconduct set out above, was so flagrant and serious as to justify their terminations. In reaching this conclusion, I note that the strike began and ended on December 7 and that picketing had ended. The employees were being brought back to their jobs pursuant to the Union's offer to return to work on the afternoon of December 7. Thus, this is not a case of discharge for misconduct on a picket line. The misconduct was prompted by the fact that Martha Orozco and Sam Orozco were unhappy with the delay that they were experiencing in

being returned to their jobs. They were not immediately returned to their jobs on the Union's offer of reinstatement, which is apparently what they had anticipated. The General Counsel concedes that the strike and the picketing were over but contends that both were nonetheless engaged in the protected concerted activity of protesting Respondent's failure to return them to their jobs. The delay was not, however, in my opinion, unreasonable in view of the fact that Respondent was committed to the employment of transferred replacements in order to provide continuing patient care, and some delay was inherent in returning to normal operations after the strike. But even if the misconduct were perceived as picket line misconduct, I would reach the same conclusion because their misconduct, in these circumstances, was such as to "reasonably tend to coerce or intimidate employees in the exercise of fights protected by the Act," i.e., refraining from engaging in the protected concerted activity of striking.[130]

4. The 8(a)(l) allegation--threats for having joined the Union

On December 10, according to Samuel Orozco, he was called at his home by Hankinson who advised him that he was being suspended. In a second call later that day, according to Samuel Orozco, he was told by Hankinson that he should not have joined the Union but had chosen the wrong side and now he knew what would happen to him. Samuel Orozco became offended, calling her "nothing but a bitch," and hung up. Hankinson denied talking to Samuel Orozco by telephone on December 10. She recalls attempting to reach him on

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[130] *Clear Pine Mouldings,* 268 NLRB 1044 (1986).

December 9 to tell him that he was being suspended, but cannot recall whether she spoke to him personally or not. She denied having made any such statement. The credible testimony convinces me that no threatening telephone call was made to Samuel Orozco on December 10 and that the call on December 9 was for the purpose, as Hankinson testified, of advising him of his suspension because of his misconduct on the prior day, not to gratuitously advise him that he was being discharged for having joined the Union. Accordingly, the 8(a)(1) allegations based on the December 10 telephone call should be dismissed.

5. Solicitation to vandalize autos

Bill Pinheiro, the maintenance manager,[131] testified that about October 1992, in the facility's parking lot, in

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[131] The record discloses that Pinheiro has been the maintenance manager for about 4 years. In this job, he is assisted by Ford. For about 40 days in early 1991, Pinheiro was also the acting housekeeping supervisor with about 10 to 13 employees under his direction. About the same time, he was also employed for about 30 to 40 days as director of staff development. It appears that Pinheiro, on his own authority, gives Ford time off and initials his timecard for payroll purposes. In Hankinson's absence, he also authorizes overtime for Ford and sends him home when overtime is not required to be worked. Although both Ford and Pinheiro are salaried, Pinheiro makes about $4 to $4.50 per hour more than Ford. Pinheiro also conducts and signs written evaluations of Ford's job performance that he submits to Hankinson. In my opinion, although Pinheiro, like Ford, works with tools and Ford is the only other employee in the maintenance department, and despite the fact that Pinheiro may not have the authority to hire or discharge employees, the record, nonetheless, supports the conclusion that Pinheiro's relationship to Ford is supervisor to supervisee and that Pinheiro is a supervisor within the meaning of the Act.

conversation with Hankinson, he was asked by her what he would take to "do something" to a car and that he responded that he didn't want to have anything to do with that. In a later conversation, but sometime prior to the strike, he was asked specifically what he would want to cut the vinyl top on Maryl Arreola's car and, again, Pinheiro declined to have anything to do with it. It appears that later, on January 22, 1992, Arreola's car was vandalized and the damage included slashing the vinyl roof.[132] Pinheiro testified that about May 1992, Ford confided to him that he had been paid by Hankinson to take care of the top of Arreola's car. Pinheiro further testified that he gave all of this information to Celano with whom he was living. Celano confirms being told by Pinheiro that Ford had been paid to damage Arreola's car.

Celano also testified that in December 1991, after the strike, she was in Hankinson's office with Jim Jones, another CNA. At that time there was on Hankinson's desk a tool that looked like a linoleum knife. Hankinson explained that it was a tool to slash tires and asked Celano if she would slash union tires. Celano said that she did not have a car to do that with, and Hankinson offered to pay for gas if she would use Celano's niece's car, but Celano refused, saying, "That's not me" and left the office.

Jones testified that while he recalled being in Hankinson's office with Celano on a few occasions, he does not recall seeing or having any conversation about a cutting tool and did not hear Hankinson offer either himself or Celano gas or money to damage any automobile. Similarly, Hankinson denied ever having anything like a linoleum knife

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[132] Arreola was a union-shop steward elected by other employees, actively supporting, the Union and was involved in attempts to negotiate a new contract with Respondent.

in her office and never offered Celano, Jones, or Ford gas or money to vandalize any auto. Hankinson testified that apart from his salary, the only additional money paid to Ford was a onetime $50 payment for "extra effort" in performing his duties short-handed.

Having reviewed all of the relevant testimony, I am satisfied that the weight of the probative evidence, particularly noting the mutually corroborated testimony of Hankinson and Jones, that Hankinson did not either solicit Celano or Jones to vandalize the auto of union supporters as alleged.

I do find, however, based on the credible evidence adduced at the hearing, that Pinheiro violated Section 8(a)(l) of the Act by telling Celano that Hankinson had solicited him to vandalize Arreola's car and that Hankinson had actually paid Ford to do it. This violation is not nullified by their close, personal relationship. Essentially, Pinheiro, a supervisor, was telling Celano, an employee, that the administrator was soliciting employees to vandalize the cars of union supporters. Whether the information is accurate or not, it was intimidating and clearly inhibitive as to the rights guaranteed to employees under Section 7 of the Act to form, join, or assist labor organizations free from employer interference.

IV. EFFECTS OF THE UNFAIR LABOR PRACTICE ON COMMERCE

The activities of the Respondent set forth in section III above, occurring in connection with Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY[133]

Having found that Respondent has engaged in and is engaging in unfair labor practices, as set out above, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having concluded that Respondent unlawfully suspended Valerie Faulkner and Amy Johnson and unlawfully discharged Amy Johnson, Nelia Aldape, Cathy Lewis, and Johnny Scott for reasons that offended the provisions of Section 8(a)(3) and (1) of the Act, Respondent shall, to the extent that this has not

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[133] On May 27, 1994, General Counsel filed a motion to reopen record to include newly discovered documents, together with the documents, relating to the single employer and remedy issues herein. The documents sought to be introduced were produced by Respondent pursuant to subpoena issued in *Beverly III (Beverly Enterprises,* 6-CA-24221, et al.). Respondent filed an opposition thereto on June 7, 1994. It appears that, except for a single document, none of the documents sought by the General Counsel to be made part of this record existed during the time period for which documents were subpoenaed in the instant case, i.e., January 1, 1988, to November 1, 1991. Respondent was under no obligation to produce them prior to the close of the hearing in the instant case, even if they came in to existence before the hearing closed. Nor is it obliged to produce them now for consideration in the instant case as newly discovered documents. I shall therefore deny the General Counsel's motion, except as to appendix E, an interoffice memorandum dated January 14, 1991, concerning "Labor Relations--1990." Regarding that document, the General Counsel's motion is granted, and the document marked as ALJ Exh. 1 is hereby made part of the record.

been accomplished, offer to the above employees full and immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges, and backpay with interest from the dates of their discharges. I shall also recommend that the Employer make all of the above employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided herein, with interest, shall be computed in the manner described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and *F. W. Woolworth Co.,* 90 NLRB 189 (1950).

The General Counsel seeks a remedy to include, in addition to the customary relief, a broad national cease-and-desist Order applying to all of Respondent's operations nationwide. This remedy was sought and granted by the Board in *Beverly 1*, supra, and it is the contention of the General Counsel that a national order is equally appropriate herein, particularly in view of the fact that the Beverly II unfair labor practices violations must now be added to the Respondent's history of unfair labor practices and make an even stronger case for extraordinary relief.[134]

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[134] On May 5, 1994, counsel for Respondent filed with me a motion for leave to file a supplemental memorandum, together with the supplemental memorandum, urging that I allow memoranda to be filed by the parties for the purpose of explaining the impact of a decision by the United States Circuit Court of Appeals for the Second Circuit in *Torrington Extend-A-Care Employee Assc. v. NLRB,* 17 F.3d 580 (2d Cir. 1994), reversing the the remedy aspects of *Beverly 1.*

In my opinion, however, the record herein, including the briefs submitted by the parties, are sufficient to resolve all of the issues raised for consideration in the instant case, including the

There can be no doubt that the Respondent has an extensive history of unfair labor practice violations. Prior to *Beverly I,* Board decisions had issued finding unfair labor practice violations at nine of the Respondent's facilities. Numerous other unfair labor practice charges against Respondent were adjusted short of adjudication, by either informal settlement or non-Board adjustment. According to the General Counsel, it perceived a pattern of continuing violations despite the settlements, and determined that rather than a "piece-meal" approach of issuing individual complaints, it would issue a single complaint including all outstanding meritorious unfair labor practice charges and complaints. That case, *Beverly I,* with amendments, grew to allegations of violations at 35 of the Respondent's facilities in 12 states during a period from about mid-1986 to mid-1988. On November 9, 1990, Judge Martin Linsky issued a decision wherein he found various 8(a)(1), (3), and (5) unfair labor practice violations by the Respondent at 33 nursing home facilities in 12 states. Linsky, in agreement with the General Counsel, concluded that a broad corporatewide remedial Order running to each of the Respondent's approximately 1000 nursing home facilities was appropriate.[135]

On January 29, 1993, the Board issued its decision in *Beverly I,* supra, concluding that Respondent had committed some 135 unfair labor practices at 32 facilities. In agreement with Judge Linsky, the Board also found that Respondent had demonstrated a proclivity to violate the Act, had engaged in

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remedy, and additional memoranda are deemed unnecessary. Accordingly, Respondent's motion is denied.

[135] Single employer status was admitted by Respondent in *Beverly* but denied and exhaustively litigated in the instant case.

a pattern of unlawful conduct, and that a broad corporatewide cease-and-desist Order would best effectuate the policies of the Act.

While *Beverly I* was being litigated, additional unfair labor practice charges and complaints were collecting at National Labor Relations Board Regional Offices over the country. These unfair labor practice allegations were based on events occurring from about mid-1988 and formed the basis for the original complaint herein that issued on August 20, 1991. Those allegations, plus some later amendments to allege additional violations after the hearing opened, were allowed by me and together comprise the unfair labor practices heard and decided in the instant case. The allegations in the instant case are based on events occurring between approximately mid-1988 and early 1992. Unfair labor practice charges and complaints after the instant case form the basis of a consolidated complaint issued by the General Counsel on June 30, 1993, *Beverly III,* supra.

It is against this background that the unfair labor practice violations found in the instant case must be evaluated to determine whether or not the request of the General Counsel and Charging Party for a broad corporatewide Order must be assessed. In my opinion, the Respondent's collective history of unfair labor practice as well as the unfair labor practices herein, warrant the imposition of such an Order.

In reviewing those considerations leading to a single employer finding, set out above, it is clear that the Respondent exercised close supervision over the individual facilities through a clearly defined and well organized hierarchy. This was especially tree in the area of labor relations. As noted above in greater detail, labor relations at the individual facilities were under the direction and control of the regional directors for human resources, and the human

resources representatives from that office attended to the labor relations needs at the various facilities. Individual facilities had little or no autonomy with respect to decisions affecting labor contracts at organized facilities or dealing with the responses to organizational efforts at unorganized facilities. On the first indication of any organizational effort, administrators were required to contact higher authority and thereafter regional human resources assumed control of an antiunion campaign to support the Respondent's "union free" philosophy. The individual facilities have no human resources representative on their staffs and rely on regional human resources for all their needs in the area of labor relations.

Corporate human resources formulates the policy and is involved in virtually all significant decisions affecting union relations, including those resulting in unfair labor practices. Union animus is manifest, by corporate involvement in efforts to evade union organization. The process is designed to repulse employee organizational efforts. At those facilities already organized, the object was to frustrate the process of collective bargaining and contract negotiation so as to undermine employee support for their Unions.

Clearly, this record discloses that it was the responsibility of corporate human resources to become and/or remain "union free." Respondent makes no bones about its expectations of corporate adherence to those principles at the corporate regional and facility levels of the organization. In this respect, the human resources policy manual states, in pertinent part:

> The company policy is to force a pro-associate [employee] relationship in a nonunion environment whenever possible.

> Regional responsibilities: . . . to support preservation of a nonunion environment through support of a pro-associate philosophy and practices.
>
> Facility responsibility: . . . to preserve a union free environment.[136]

A review of the applicable authority makes it clear that the Board, with Court approval, has ordered extraordinary relief in circumstances when the respondent has demonstrated a proclivity to violate the Act. For example, in *Hickmott Foods,* 242 NLRB 1357 (1979), a broad cease-and-desist Order prohibiting Respondent from violating employee Section 7 rights in "any other manner" rather than the customary "any like or related manner" was deemed appropriate. In other cases, cease-and-desist relief has been afforded, running to employer locations in addition to those where the unfair labor practices occurred. *J. P. Stevens & Co.,* 247 NLRB 420-(1980); *Florida Steel Corp.,* 244 NLRB 395 (1979), revd. and remanded 646 F.2d 616 (D.C. Cir. 1981), reaffirmed 262 NLRB 1460 (1982), enfd. in pertinent part 713 F.2d 828 (D.C. Cir. 1983); *S. E. Nichols, Inc.,* 284 NLRB *556* (1987), enfd. 862 F.2d 952 (2d Cir. 1988). Of course, as discussed herein, the propriety of such relief was recently affirmed by the Board in circumstances much the same as the instant case in *Beverly I,* supra, although, as noted above, the Board's national corporatewide cease- and-desist Order was denied enforcement by the Second Circuit.

Respondent argues, however, that the unfair labor practices alleged in the instant case were relatively

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[136] G.C. Exh. 403, labor relations section, p. 1.

inconsequential, far less serious collectively than those found by the Board in *Beverly I,* and that they occurred at relatively few of the Respondent's facilities nationwide; further, that in context, a companywide remedial Order would be punitive rather than remedial.

First, the Board has substantial discretion in determining what relief is appropriate to remedy violations in order to effectuate the policies of the Act.[137] In *Beverly I,* the Board concluded that Respondent's proclivity to violate the Act was so aggravated that it would effectuate the policies of the Act for the relief to include a corporatewide cease-and-desist Order. Now, to this background of unfair labor practices found by the Board in *Beverly I,* have been added those violations found herein. Although it is true, as Respondent contends, that the violations at certain facilities were not serious, violations at other facilities were substantial. Moreover, the violations at those facilities disclose a corporate effort to remain union free even at the expense of those rights guaranteed by the Act.

Respondent also argues that it has "cleaned up its act" and points to the departure of Division Human Resources Representative Hugh Gregg. In *Beverly I,* Gregg was singled out as a principal offender. Respondent also argues that efforts have been undertaken to train and educate staff at the facility level so as to avoid the commission of unfair labor practices. Although Respondent may be somewhat sadder and wiser, however, this record discloses no clean break with the Respondent's history of unlawful behavior. In these

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[137] *Fiberboard Corp. v. NLRB,* 379 U.S. 203, 216 (1964); *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 540 (1943).

circumstances, I conclude that a corporatewide cease-and-desist Order is appropriate.

In reaching this conclusion, let me add that I am aware that the U.S. Court of Appeals for the Second Circuit, as noted above, has rejected the corporatewide remedy found appropriate by the Board in *Beverly I*. Nonetheless, it is my obligation to follow applicable Board precedent even when there exists a conflict with U.S. Circuit Courts of Appeal.

Turning to those other elements of relief sought by the Board, I conclude that posting at all of the Respondent's individual nursing home facilities is appropriate, particularly because the cease-and-desist Order applies to all the individual facilities.

The General Counsel also seeks additional extraordinary relief requiring Respondent to: send written instructions to all its administrators, managers, and supervisors at all of its facilities requiring them to comply with the provisions of the Order and notice; reimburse the Board for all costs and expenses incurred by the Board in the investigation, preparation, presentation, and conduct before the National Labor Relations Board and the Courts of that portion of the case related to the single-employee issue; grant to the Charging Party labor organizations, in both the instant case and *Beverly I*, and their representatives, on request, (1) reasonable access to its bulletin boards and all places where notices to employees are customarily posted, (2) reasonable access to employees at its facilities in nonwork areas during employees' nonworktime, and (3) notice of and equal time and facilities for the Charging Party Unions to respond to any address made by Respondent to its employees at any location on the question of union representation; afford to any labor organization, including the Charging Party Unions, the right to deliver a 30-minute speech to employees on working time

prior to any Board election that may be scheduled in which the labor organization is a participant; the provisions of the Order to run for a period of 2 years from the date of the posting of any Notice to Employees. Also that Respondent submit to discovery procedures by the Board concerning compliance matters under the Federal Rules of Civil Procedure under the supervision of the U.S. Circuit Court of Appeals enforcing the Order.

In my opinion, the extraordinary relief provided herein is adequate and provides appropriate and adequate relief for the unfair labor practice violations found herein. The additional extraordinary relief sought by the General Counsel and Charging Parties is not necessary in order to effectuate the policies of the Act, and I shall recommend that, except for the extraordinary relief providing for a corporatewide Order applying to all facilities and the posting of notices at all of those facilities, the requests for extraordinary relief should be denied.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By interfering with restraining and coercing employees in the exercise of the fights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. By discharging, suspending, or otherwise disciplining employees as set out herein, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (4) of the Act.

5. By refusing to bargain with the Union, as set out herein, Respondent has violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[138]

ORDER

The Respondent, Beverly California Corporation f/k/a Beverly Enterprises, Its Operating Divisions, Regions, Wholly-Owned Subsidiaries and Individual Facilities and each of them, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to form and join organizations to represent them as to their terms and conditions of employment.

(b) Threatening employees with reprisals for having selected a union as their collective-bargaining representative.

(c) Interrogating employees about their union sentiments.

(d) Creating the impression that employees' union activities are under surveillance.

(e) Telling employees that their suspensions are related to their union activity.

(f) Posting or promulgating unlawfully broad no-solicitation or no-distribution rules.

(g) Soliciting and adjusting employee complaints and grievances during union organizing campaigns.

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[138] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Threatening employees with disciplinary action and/or discharge for engaging in lawful union or protected concerted activity, including strikes, picketing, and distribution of union literature.

(i) Promising benefits, including the recission of disciplinary action for crossing union picket lines to come to work.

(j) Soliciting employees to sign and/or circulate decertification petitions.

(k) Assaulting union representatives or delegates.

(l) Telling employees that union representatives or delegates will be killed.

(m) Ordering employees to remove coffee mugs bearing union logos from the facility.

(n) Forbidding lawful solicitation or distribution on behalf of unions during nonwork time and nonpatient care areas.

(o) Promising to expedite the receipt of employee benefits, including tuition reimbursement.

(p) Telling employees that union organization is futile.

(q) Demanding immediate repayment of loans in retaliation for joining a Union.

(r) Telling employees that other employees had been solicited and paid to vandalize the property, including automobiles, of union supporters.

(s) Discharging, suspending, or imposing any disciplinary action on employees, including written warnings, oral warnings, or transfers because of their activities on behalf of a union, or their participation in other concerted protected activity.

(t) Discharging, disciplining, or otherwise discriminating against employees for serving as union

observers during representation elections under the Act, or otherwise discriminating against employees for having filed charges or given testimony under the Act.

(u) Unilaterally implementing changes in terms and conditions of employment of employees without prior notice to or affording an opportunity to bargain to the Union selected as their collective-bargaining representative.

(v) Failing and refusing to supply any union representing its employees, on request, with information necessary and relevant to its collective-bargaining functions.

(w) Failing and refusing to bargain in good faith, and withdrawing recognition from any union selected by its employees as their collective-bargaining representative.

(x) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different facilities if necessary) without prejudice to their seniority and other fights and privileges, to the following employees:

Peggy Urban (Liberty House Nursing Home)
Nelia Aldape (Beverly Manor Convalescent Hospital/ Monterey, California)
Cathy Lewis (Beverly Health Care Center)
Johnny Scott (Beverly Manor Convalescent Hospital/ San Francisco, California)
Amy Johnson (Duke Convalescent facility)

(b) Make whole, commencing from the date of their unlawful discharge or suspension as the case may be, the employees listed in 2(a) above and Valerie Faulkner, unlawfully suspended at Duke Convalescent Facility, for any loss of pay and other benefits suffered by them as a result of the discrimination practiced against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Remove from its files any reference to the discharges or suspensions of the persons listed in 2(a) and (b) above, and the unlawful disciplinary actions taken, respectively, against Lily Davis and Kastle Gannon (Fountainview Place), Alice Adams, Esther Bennett, Charles Benninger, Amanda Bradish, Jennifer Buckingham, Patt Carr, Suzanne Clearwater, Betty Cona, Helen Evans, Carolyn Ferguson, Antoinette Gorko, Donna Hollister, Karen Holsopple, Sharon Karp, Herman Kathi, Lori King, Deborah Kintner, Dawn Kisner, Linda Krill, David Lewis, Marie Meador, Dorothy Moskowitz, Debra Redmond, Chris Sheridan, Lorraine Zelenka and Mary Zone (Carpenter Care Center), and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

(d) On request, furnish to the applicable union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

(e) On request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with any union selected by its employees as their collective-bargaining representative.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll

records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at all its facilities copies of the attached notice marked "Appendix."[139] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 29, 1994

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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[139] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit employees to form and join organizations to represent them regarding their terms and conditions of employment.

WE WILL NOT threaten employees with reprisals for having selected a union as their collective-bargaining representative.

WE WILL NOT interrogate employees about their union sentiments.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT tell employees that their suspensions are related to their union activity.

WE WILL NOT post or promulgate unlawfully broad no-solicitation or no-distribution rules.

WE WILL NOT solicit and adjust employee complaints and grievances during union organizing campaigns.

WE WILL NOT threaten employees with disciplinary action and/or discharge for engaging in lawful union or protected concerted activity, including strikes, picketing and distribution of union literature.

WE WILL NOT promise benefits, including the recission of disciplinary action for crossing union picket lines to come to work.

WE WILL NOT solicit employees to sign and/or circulate decertification petitions.

WE WILL NOT assault union representatives or delegates.

WE WILL NOT tell employees that union representatives or delegates will be killed.

WE WILL NOT order employees to remove coffee mugs bearing union logos from the facility.

WE WILL NOT forbid lawful solicitation or distribution on behalf of unions during nonwork time and nonpatient care areas.

WE WILL NOT promise to expedite the receipt of employee benefits, including tuition reimbursement.

WE WILL NOT tell employees that union organization is futile.

WE WILL NOT demand immediate repayment of loans in retaliation for joining a union.

WE WILL NOT tell employees that other employees had been solicited and paid to vandalize the property, including automobiles, of union supporters.

WE WILL NOT discharge, suspend or impose any disciplinary action on employees, including written warnings, oral warnings, or transfers because of their activities on behalf of or support for a union, or their participation in other concerted protected activity.

WE WILL NOT discharge, discipline, or otherwise discriminate against employees for serving as union observers during representation elections under the Act, or otherwise discriminate against employees for having filed charges or given testimony under the Act.

WE WILL NOT unilaterally implement changes in terms and conditions of employment of employees without prior notice to or affording an opportunity to bargain to the Union selected as their collective-bargaining representative.

WE WILL NOT fail and refuse to supply any union representing our employees, on request, with information necessary and relevant to its collective-bargaining functions.

WE WILL NOT fail and refuse to bargain in good faith, or withdraw recognition from any union selected by our employees as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different facilities if necessary) without prejudice to their seniority and other rights and privileges, to the following employees:

Peggy Urban (Liberty House Nursing Home)
Nelia Aldape (Beverly Manor Convalescent Hospital/ Monterey, California)
Cathy Lewis (Beverly Health Care Center)
Johnny Scott (Beverly Manor Convalescent Hospital/ San Francisco, California)
Amy Johnson (Duke Convalescent facility)

WE WILL make whole, commencing from the date of their unlawful discharge or suspension as the case may be, the employees listed above and Valerie Faulkner, unlawfully suspended at Duke Convalescent Facility, for any loss of pay and other benefits suffered by them as a result of the discrimination practiced against them.

WE WILL remove from our files any reference to the discharges or suspensions of the persons listed above, and the unlawful disciplinary actions taken, respectively, against Lily Davis and Kastle Gannon (Fountainview Place) Alice Adams, Esther Bennett, Charles Benninger, Amanda Bradish, Jennifer Buckingham, Patt Carr, Suzanne Clearwater, Betty Cons, Helen Evans, Carolyn Ferguson, Antoinette Gorko, Donna

Hollister, Karen Holsopple, Sharon Karp, Herman Kathi, Lori King, Deborah Kintner, Dawn Kisner, Linda Krill, David Lewis, Marie Meador, Dorothy Moskowitz, Debra Redmond, Chris Sheridan, Lorraine Zelenka and Mary Zone (Carpenter Care Center), and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

WE WILL, on request, furnish to the applicable union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

WE WILL, on request, bargain in good faith concerning wages, hours, and other terms and conditions of employment with any union selected by our employees as their collective-bargaining representative.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY-OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM

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FILED
JUN 1 2001

No. 00-1563

In the Supreme Court of the United States

BEVERLY CALIFORNIA CORP., DBA BEVERLY ENTERPRISES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the National Labor Relations Board acted within its remedial authority in imposing on petitioner a corporate-wide cease and desist and notice-posting order.

2. Whether the court of appeals abused its discretion when it permitted petitioner to file a brief that significantly exceeded the page limits established in Federal Rule of Appellate Procedure 32, but denied petitioner's request to file an even longer brief.

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In the Supreme Court of the United States

No. 00-1563

BEVERLY CALIFORNIA CORP., DBA BEVERLY ENTERPRISES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 227 F.3d 817. The decisions and orders of the National Labor Relations Board (Pet. App. 80a-151a, 405a-437a), and the decisions of the administrative law judges (Pet. App. 152a-402a, 438a-603a) are reported at 326 N.L.R.B. 153 and 326 N.L.R.B. 232.

JURISDICTION

A petition for rehearing was denied on January 8, 2001. The judgment of the court of appeals (Pet. App. 52a-74a) was entered on March 23, 2001. Pet. App. 50a-51a. The petition for a writ of certiorari was filed on

April 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a California corporation that owns and operates approximately 900 nursing homes throughout the United States. Pet. App. 2a, 154a-155a, 440a. Petitioner has a three-tiered organizational structure, "moving from the corporate level through the regional, and then down to the individual facilities." *Id.* at 3a. Petitioner formulates its labor relations policy at the corporate level. *Ibid.* Personnel at the regional level bargain with unions at individual facilities. Each facility's managers handle front-line labor relations. *Ibid.*

Petitioner has repeatedly violated the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* Pet. App. 2a, 5a, 49a, 420a, 427a-428a. In a prior proceeding known as *Beverly I*, the Board found that, between 1986 and 1988, petitioner committed 135 unfair labor practices at 32 of its facilities. *Beverly California Corp.* (*Beverly I*), 310 N.L.R.B. 222, 228 (1993), enforcement granted in part and denied in part *sub nom. Torrington Extend-A-Care Employee Ass'n* v. *NLRB*, 17 F.3d 580 (2d Cir. 1994); see Pet. App. 3a-4a. The Board found that "this and earlier litigation reveal * * * [petitioner's] pattern of thwarting union organizing campaigns and otherwise disregarding the fundamental statutory rights of its employees." 310 N.L.R.B. at 231 (footnote omitted).

Petitioner persisted in that same unlawful pattern of conduct in the present cases. In August 1991, before administrative proceedings in *Beverly I* were completed, the Board's General Counsel issued a new consolidated complaint against petitioner in a proceeding

known as *Beverly II*, 326 N.L.R.B. 153 (1998); Pet. App. 4a, 152a-153a. That complaint alleged that petitioner had committed numerous unfair labor practices at 17 facilities. *Id.* at 4a, 388a. In June 1993, the General Counsel issued yet another consolidated complaint in a proceeding known as *Beverly III*, *id.* at 1a-49a, alleging that petitioner had committed numerous additional unfair labor practices at 11 facilities. *Id.* at 4a-5a, 439a.

2. Hearings in *Beverly II* and *Beverly III* were conducted before two administrative law judges (ALJs). Pet. App. 4a-5a, 153a, 439a. The Board issued a separate decision in each case. It found, in substantial agreement with the decisions of the ALJs, that petitioner had engaged in additional pervasive unfair labor practices. *Id.* at 80a-402a, 405a-603a.

a. In *Beverly II*, the Board found that petitioner committed 78 violations of the Act at 17 facilities in nine States. Pet. App. 426a. Among many other unfair labor practices, the Board found that petitioner: fired employees because of their support for a union at facilities in Lancaster, Pennsylvania, Clifton Forge, Virginia, Glasgow, West Virginia, and Monterey and San Francisco, California, contrary to Section 8(a)(3) of the Act,[1] *id.* at 85a, 175a-183a, 221a, 228a-232a, 236a-238a, 258a-261a, 263a-264a, 289a-292a, 294a-297a, 298a-299a, 311a-320a; unilaterally altered employees' terms of employment without bargaining with their union at facilities in Mount Lebanon, Tunkhannock, and East Stroudsburg, Pennsylvania, and Danbury, Connecticut, contrary to

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[1] Section 8(a)(3), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Section 8(a)(5) of the Act,[2] *id.* at 83a n.3, 184a-190a, 193a-194a, 197a-202a, 320a-321a, 325a-326a, 335a, 351a-352a, 361a-362a; and assisted employees in circulating a decertification petition at a facility in Fresno, California, and then withdrew recognition from the union based on that petition, contrary to Section 8(a)(5), *id.* at 362a-368a.

In *Beverly III*, the Board found that petitioner committed 28 violations of the Act at nine facilities in six States. Pet. App. 426a. Among many other unfair labor practices, the Board found that petitioner: timed a wage increase in order to stem a union organizing campaign at a facility in Lewistown, Pennsylvania, contrary to Section 8(a)(1) of the Act,[3] *id.* at 412a, 447a-454a; withheld a wage increase prior to an election at a facility in Panama City, Florida, and then granted the wage increase after the union lost the election, contrary to Section 8(a)(1) and (3), *id.* at 577a-582a; threatened employees with loss of their licenses and jobs if they supported the union at a facility in Deltona, Florida, contrary to Section 8(a)(1); and threatened to sell a facility in East Moline, Illinois, if the employees selected union representation, contrary to Section 8(a)(1), *id.* at 412a-413a, 419a, 469a, 471a, 473a, 476a-477a, 500a, 503a.

In *Beverly III*, the Board also found that "the evidence presented in *Beverly II* and *III* * * * over-

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[2] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

[3] Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," 29 U.S.C. 157, among which is "the right * * * to bargain collectively through representatives of their own choosing."

whelmingly demonstrates that [petitioner] is a single employer within the meaning of the Act." Pet. App. 408a-409a, 441a-443a. That single-employer entity, the Board determined, "includes [petitioner's] central corporate headquarters in Fort Smith, Arkansas, and its various operating divisions and regions * * * and each of its individual facilities." *Id.* at 441a-442a. See also *id.* at 82a-83a, 162a (making similar finding in *Beverly II*). In particular, the Board found that the evidence reflected "the obvious truth that [petitioner] is in full control of its human resources and labor relations policies as carried out by its individual facilities." *Id.* at 445a.

b. To fashion an appropriate remedy for petitioner's unfair labor practices, the Board coordinated its decisions in *Beverly II* and *Beverly III*. Pet. App. 4a, 96a-97a, 420a-428a. In *Beverly III*, the Board adopted the ALJ's recommendation for "a broad nationwide cease-and-desist order and nationwide posting of the order at all of [petitioner's] facilities." *Id.* at 420a, 421a. The Board found that "a corporate-wide order is warranted on the basis of the record of violations committed during the total period covered by *Beverly I*, *Beverly II*, and *Beverly III*." *Id.* at 428a.

Noting that "[t]he Board has always recognized that it has the authority to issue employer-wide orders against a recidivist with a record of unfair labor practices in more than one facility" (Pet. App. 427a), the Board explained that petitioner is such a recidivist. *Id.* at 426a. The Board noted that "[t]he violations found in the three cases total approximately 240; they were committed at 54 different facilities in 18 states; and they include a number of differing types of coercive conduct within the meaning of Section 8(a)(1), as well as violations of Section 8(a)(3) and 8(a)(5)." *Ibid.* In

further support of a corporate-wide cease and desist order, the Board explained that "the involvement of divisional or regional personnel in unfair labor practices has continued since the period covered by *Beverly I*." *Ibid.* (footnote omitted). In particular, "[r]egional personnel were involved in the commission of more than a dozen unfair labor practices in *Beverly II* and *Beverly III*," and, in *Beverly III*, there was "corporate involvement" in violations at two facilities. *Id.* at 426a-427a. "These findings," the Board explained, "support the ultimate conclusion that [petitioner] exercises substantial control over labor relations policies and practices at the facility level." *Id.* at 427a.

In addition to the direct involvement of regional and corporate level personnel in the commission of unfair labor practices, the Board observed that labor relations at individual facilities were "under the direction and control of a regional director for human resources in each separate region." Pet. App. 427a. The Board emphasized that "[w]henever a union conducted an organizing campaign at a facility, human resources personnel were dispatched to conduct [petitioner's] antiunion campaign and assumed substantial control of many of the facility's actions during the critical period." *Ibid.* And, "[w]here a facility was already organized, the same regional personnel had the responsibility for conducting negotiations, executing labor agreements, and handling grievances beyond the preliminary steps." *Ibid.*

In sum, the *Beverly III* Board concluded that, in pursuing its "corporate policy" of "oppos[ing] unionization of its employees," petitioner "has regularly engaged in brinksmanship at the expense of its employees' Section 7 rights." Pet. App. 428a. Thus, "[t]he procession of violations in facility after facility of [petitioner's] opera-

tions and the continuing involvement of officials above the facility level in labor relations * * * warrants a remedial approach that is something other than business as usual." *Ibid.*

Accordingly, the Board, in *Beverly III*, issued "a broad order with corporate-wide application." Pet. App. 428a. The Board ordered petitioner, its operating divisions, wholly-owned subsidiaries, and individual facilities to cease and desist from engaging in specified unfair labor practices. *Id.* at 428a-431a. The Board also ordered petitioner, among other things, to "post at all of its facilities" copies of a specified notice. *Id.* at 432a, 434a-437a.

In issuing a corporate-wide cease and desist order, the *Beverly III* Board acknowledged that in *Torrington Extend-A-Care*, *supra*, the Second Circuit "declined to enforce a similar remedy in *Beverly I*." Pet. App. 420a. The Board explained, however, that "we are approaching the remedial issue on a full record different from that confronting the court of appeals in *Beverly I*." *Id.* at 428a. Noting the "continuing pattern of unfair labor practices" committed by petitioner after *Beverly I*, the Board concluded that the "cumulative effect" of its findings in *Beverly II* and *Beverly III* "significantly differentiates the record on which we issue the present order from the record" in *Torrington*. *Id.* at 426a-427a. Having "granted a corporatewide order" in *Beverly III*, the Board found it "unnecessary to grant a broad order" in *Beverly II*. *Id.* at 97a. Accordingly, in *Beverly II*, the Board issued "separate remedial orders * * * tailored to the violations found at each of the individual facilities." *Ibid.* See also *id.* at 97a-126a.

3. Petitioner and the Service Employees International Union filed petitions for review of the Board's orders in *Beverly II* and *Beverly III* in three courts of

appeals, including the Seventh Circuit. Pet. App. 5a. The petitions for review were consolidated before the Seventh Circuit. *Id.* at 1a-2a, 5a, 8a, 53a. The Board filed cross-applications for enforcement of its orders. *Id.* at 5a.

In the court of appeals, petitioner filed a motion for leave to submit an opening brief 272% longer than that permitted by Federal Rule of Appellate Procedure 32(a)(7). Pet. 8. Judge Diane P. Wood granted petitioner's motion in part, permitting it "to file an opening brief that does not exceed 19,600 words," *i.e.*, "a brief 40% longer than the rules normally permit." Pet. App. 6a, 75a-76a. Judge Wood's order stated that "[t]he court will not entertain a motion to reconsider this order." *Id.* at 76a.

Petitioner submitted a "motion for leave to file a motion for reconsideration, and request for en banc consideration of the motion or, alternatively, three-judge panel review." Pet. App. 78a. Judge Wood denied petitioner's motion. *Id.* at 77a-79a. In the course of ruling on the merits of petitioner's appeal, the court of appeals noted that "given the scope of this case and the kinds of arguments this court is entitled to consider, the case was manageable within the limitations we imposed." *Id.* at 9a.

On the substantive issues, the court of appeals enforced the Board's orders in part, vacated them in part, and remanded the cases to the Board for further proceedings. Pet. App. 1a-49a. The court noted that petitioner had "not challenged a significant number of the Board's findings of particular violations at particular facilities." *Id.* at 11a-12a; see also *id.* at 12a-14a (summarizing uncontested findings). The court examined the record evidence bearing on 42 challenged unfair labor practice findings, and concluded that

substantial evidence supported all but three of the Board's findings. *Id.* at 9a, 15a-46a.[4]

The court of appeals also held that "the Board did not abuse its discretion in principle in imposing a corporate-wide remedy." Pet. App. 3a. It explained that "[a] key point underlying the Board's approach to these cases is its finding * * * that Beverly is a single employer, a single integrated enterprise with a unified labor relations policy." *Id.* at 6a (emphasis omitted). "Viewed in this light, and also taking into account the mounting evidence that Beverly facilities continue to violate the law with regularity," the court found it "hardly surprising that the Board would have considered corporate-wide relief to be appropriate." *Id.* at 7a. The court elaborated:

> When an employer has many different facilities, all of which are affected by the same general policies, the Board is not required to proceed facility-by-facility, waiting for the next shoe, and the next shoe, to drop. It can instead require the company as a whole to eliminate the policies that lead to the commission of unfair labor practices by managers lower down on the corporate ladder.

Ibid.

The court found that "[p]erhaps the fact that most strongly supports the Board's chosen remedy * * * is the ubiquitous nature of the area personnel at local facilities whenever labor problems arose." Pet. App. 48a. Thus, "[i]n case after case, at facility after facility, the Board saw regional managers coming in to ensure that Beverly's overall corporate policy was imple-

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[4] The court of appeals rejected the union's challenge to the Board's orders. Pet. App. 33a-34a, 41a-42a. The union has not sought review of that aspect of the decision below.

mented." *Ibid.* The court explained that, "in this instance the Board was entitled to conclude that nothing less than a corporate-wide order would do the job of correcting the proclivity this company has shown for committing or tolerating unfair labor practices at a significant number of its facilities." *Id.* at 48a-49a.

The court of appeals further concluded that "[n]othing in *Torrington Extend-A-Care* * * * is to the contrary; in that case the Second Circuit merely found that the record as of the time of *Beverly I* did not support corporate-wide relief." Pet. App. 7a. Thus, "as both the Board and the two ALJs here pointed out, the record now before us is a far richer one." *Id.* at 48a. The court found that "[t]he Board was entitled to conclude, especially after specific remedies in *Torrington* did not appear to stop the efforts from the company's central management to stop unions in any way possible, that the time was past for piecemeal relief." *Ibid.*

While concluding that "the Board is entitled to impose corporate-wide relief," in view of "Beverly's recidivism and the corporate direction the Board has found pervading its handling of union complaints," the court found that "[t]he specific order it entered * * * is problematic." Pet. App. 49a. The court was "concerned that much of it is nothing more than a laundry list of the particular violations committed at individual facilities." *Ibid.*; see also *id.* at 3a. The court, however, did "not consider it appropriate to go through the order in the first instance and decide which parts are properly directed to the corporation as a whole and which to particular facilities." *Id.* at 49a. Rather, the court

vacated the Board's order in *Beverly III* and "le[ft] this task to the Board on remand." *Ibid.*[5]

ARGUMENT

1. Petitioner contends (Pet. 15-29) that the Board abused its discretion in issuing a corporate-wide order. That contention is not ripe for review and, in any event, is without merit and does not warrant review.

a. Petitioner's challenge to the Board's corporate-wide order is not ripe for review, because there does not exist, at present, a judicially enforced corporate-wide order against petitioner. Although the court of appeals held that "the Board did not abuse its discretion *in principle* in imposing a corporate-wide remedy" (Pet. App. 3a (emphasis added)), the court vacated the Board's corporate-wide order, and remanded both *Beverly II* and *Beverly III* to the Board for further proceedings. *Id.* at 3a, 49a. On remand, the Board must determine "which parts [of a remedial order in *Beverly III*] are properly directed to the corporation as a whole and which to particular facilities." *Id.* at 49a. On remand, the Board must also fashion appropriate remedial notices for posting by petitioner in both *Beverly II* and *Beverly III*. See note 5, *supra*.

Because the court of appeals vacated and remanded the Board's order in *Beverly III*, it would be premature to address petitioner's abstract challenge to the Board's

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[5] The judgment of the court of appeals requires petitioner to cease and desist from engaging in specified unfair labor practices only at the individual facilities involved in *Beverly II*. The court's judgment does not require petitioner to post a notice at those facilities. The question of appropriate notice-posting measures in *Beverly II*, and the entirety of the Board's corporate-wide remedy in *Beverly III*, were remanded to the Board for further proceedings consistent with the court's opinion. See Pet. App. 52a-74a.

issuance of a corporate-wide remedy. Once the Board issues a concrete order, and the court of appeals reviews that order, petitioner may seek review in this Court of that concrete order. In the present interlocutory posture of the case, review by this Court is not warranted. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

b. In any event, petitioner's challenge to the Board's choice of remedy in *Beverly III* is without merit and does not raise any issue that warrants review. Section 10(c) of the Act authorizes the Board to impose a cease and desist order upon "any person" whom the Board has found to have "engaged in * * * any * * * unfair labor practice." 29 U.S.C. 160(c). This Court has held that "[t]he test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice affecting commerce.'" *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 390 (1945). Thus, the Board may issue "an order restraining other violations" of the Act where "[the] danger of their commission in the future is to be anticipated from the course of [the employer's] conduct in the past." *Id.* at 392 (quoting *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 437 (1941)).

Consistent with those principles, the Board, upheld by the courts of appeals, has found it appropriate to order corporate-wide cease and desist relief where the employer has manifested a "clear and longstanding proclivity * * * to commit similar violations at its other facilities." *J.P. Stevens & Co.*, 245 N.L.R.B. 198, 198 (1979), enforced in relevant part, 638 F.2d 676 (4th Cir. 1980). See also, *e.g.*, *J.P. Stevens & Co.*, 240

N.L.R.B. 33, 33 (1979) (ordering employer "to cease and desist from engaging in unfair labor practices on a corporationwide basis," given employer's "history of serious and similar violations of the Act and its disregard of past Board [o]rders") (footnotes omitted), enforced, 612 F.2d 881 (4th Cir.), cert. denied, 449 U.S. 918 (1980); *Florida Steel Corp.*, 222 N.L.R.B. 955, 956 (ordering employer "to cease and desist from such practices on a corporatewide basis," in view of its "recent history of similar violations"), enforced *mem.*, 536 F.2d 1385 (5th Cir. 1976). As the Second Circuit explained in *Beverly I*, "[a] corporate-wide order is properly remedial where * * * the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites." *Torrington Extend-A-Care Employee Ass'n* v. *NLRB*, 17 F.3d 580, 585 (1994).

Applying those settled principles, the Board acted well within its discretion in imposing a corporate-wide order on petitioner. In *Beverly I*, *Beverly II*, and *Beverly III*, the Board found that petitioner had engaged in 240 unfair labor practices at 54 facilities in 18 States. Those findings demonstrate that petitioner is a recidivist employer with a strong proclivity for violating the Act. Pet. App. 49a, 426a. Moreover, regional and corporate level personnel have continued to be involved in the commission of unfair labor practices, *id.* at 426a-427a, and petitioner's "unified labor relations policy" is enforced at individual facilities by regional managers, *id.* at 6a, 48a, 427a-428a. As the court of appeals concluded, in those circumstances, "the Board is not required to proceed facility-by-facility, waiting for the next shoe, and the next shoe, to drop." *Id.* at 7a. Rather, "[t]he Board was entitled to conclude, especially after specific remedies in *Torrington* [*i.e.*, *Beverly*

I] did not appear to stop the efforts from the company's central management to stop unions in any way possible, that the time was past for piecemeal relief." *Id.* at 48a.

Petitioner contends (Pet. 17-18) that the Board's corporate-wide order is "punitive and not remedial" because it "do[es] substantially more than what is necessary to remedy the consequences of the unfair labor practices in these cases." That contention, however, simply ignores the Board's findings that petitioner has systematically violated the Act at a substantial number of facilities, that regional and corporate level personnel were involved in the violations, that facility-specific relief has proven inadequate to halt petitioner's illegal conduct, and that petitioner can be expected to violate the Act at other facilities in the future absent a corporate-wide order.

Contrary to petitioner's suggestion (Pet. 22-23, 29), it is not punitive for the Board to place it "at risk of future contempt proceedings," should petitioner violate the Act at a facility where it has not previously committed unfair labor practices. A corporate-wide order is "properly remedial," not punitive, where, as here, "the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites." *Torrington*, 17 F.3d at 585. It is entirely proper for the Board to initiate a contempt proceeding against a party who flouts a judicially enforced Board order. See, *e.g.*, *May Dep't Stores*, 326 U.S. at 388; *Express Publ'g Co.*, 312 U.S. at 433; see also *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568 (1950) (notwithstanding employer's voluntary compliance, Board is entitled to enforcement of cease and desist order, and to seek contempt sanctions if that order is violated).

Petitioner argues (Pet. 22) that "the record here * * * contains substantial record evidence demonstrating that the unfair labor practices in these cases * * * do not involve conduct or policies that extend beyond the location where the specific unfair labor practices occurred." The Board, however, found otherwise; and the court of appeals concluded that substantial evidence supports the Board's finding. Petitioner's fact-bound contention raises no issue warranting this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner also contends (Pet. 26-27) that "[t]he record here shows that Beverly has a lawful written policy in place regarding its position on unionization," and, therefore, it is unlike J.P. Stevens & Co., an employer upon which the Board has imposed corporate-wide orders. Regardless of petitioner's announced policy, however, the Board's findings demonstrate that, in practice, petitioner's labor relations policies, and its centralized manner of enforcing those policies, have caused it to regularly violate its legal obligations under the Act. See Pet. App. 2a, 5a, 49a, 420a, 427a-428a. As a recidivist violator of the Act, petitioner is, like any other such employer, subject to a corporate-wide order. See *J.P. Stevens & Co*, 245 N.L.R.B. at 198.[6]

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[6] Petitioner argues (Pet. 28) that "[t]he critical point in the *J.P. Stevens* line of cases is that the Board's order needed to be extended to other locations because the record showed that employees at those other locations knew about the unfair labor practices that were occurring elsewhere." But that was not the basis for the Board's imposition of corporate-wide relief against that employer. Instead, the Board's orders were premised on its findings that J.P. Stevens engaged in a systematic pattern of violations at numerous facilities. See, *e.g.*, *J.P. Stevens & Co*, 245 N.L.R.B. at 198 ("clear and longstanding proclivity of Respondent to commit similar viola-

Petitioner also contends (Pet. 29) that a corporate-wide remedy is unwarranted because, "[e]ven when all three cases are combined, the number of nursing homes involved in this aggregated litigation represent only 6% of Beverly's nursing homes over a six year period." But, as the court of appeals noted, only 10% of petitioner's facilities are unionized, and, in *Beverly II* and *Beverly III*, petitioner committed unfair labor practices at 15% of those facilities. Pet. App. 47a. Petitioner also committed violations during two out of the five, or 40%, of the representation elections held by the Board in 1990. *Id.* at 47a-48a. Numbers, moreover, do not tell the whole story. As already noted, regional and corporate level personnel were involved in the violations and facility-specific relief has failed to halt petitioner's pattern of illegal conduct. The Board therefore reasonably concluded that a corporate-wide order was appropriate.

Finally, petitioner errs in asserting (Pet. 20) that the Board's corporate-wide notice posting requirement is unwarranted because employees at facilities not involved in the present litigation are neither "victims of discrimination," nor "aware of the unfair labor practices." The purpose of a corporate-wide notice is to assure employees at all of the employer's facilities that, if they engage in union activity, they will be protected against the unlawful tactics which their employer has shown a proclivity for utilizing at other work sites where union activity has occurred. See *Express Publishing Co.*, 312 U.S. at 438 (posting of notices "advis[es] the employees of the Board's order and

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tions at its other facilities"); *J.P. Stevens & Co.*, 240 N.L.R.B. at 33 ("history of serious and similar violations of the Act and its disregard of past Board [o]rders") (footnote omitted).

announc[es] the readiness of the employer to obey it"). A corporate-wide notice provision thus complements a corporate-wide cease and desist order. Where, as here, the Board has reasonably issued a corporate-wide cease and desist order to the employer, it is also reasonable for the Board to assure that the employees are apprised of the terms of that order by requiring the posting of notices at all of the employer's work sites.

2. Petitioner also contends (Pet. 11-12) that "[t]he 19,600 word limitation imposed by Judge Wood was a clear abuse of discretion because it operated to deprive Beverly of the meaningful opportunity to obtain review of the two orders issued by the Board." That contention is without merit and does not warrant review.

Courts of appeals have discretion to decide the extent to which they will allow briefing in excess of the limits established in Federal Rule of Appellate Procedure 32. See Fed. R. App. P. 32(d). The court of appeals in this case did not abuse that discretion. As the court noted, "the page limits that were imposed upon [petitioner's] briefing * * * allowed it to file a brief 40% longer than the rules normally permit." Pet. App. 6a. The court of appeals also had access to the entire record. There is therefore no reason to question the court of appeals' conclusion that, "given the scope of this case and the kinds of arguments this court is entitled to consider, the case was manageable within the limitations we imposed." *Id.* at 9a.

Moreover, petitioner has not shown that it was harmed by the court of appeals' refusal to grant petitioner's extraordinary request for a 272% increase in briefing space. Petitioner fails to proffer a single argument that it was prevented from making, much less demonstrate that any such argument would have transformed any of its non-meritorious substantial

evidence challenges into a meritorious one. In any event, the question whether the court of appeals abused its discretion in partially denying petitioner's extraordinary request is entirely fact-bound; it does not raise any issue of recurring importance that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Beverly California Corp.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY TO OPPOSITION

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RULES

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I.

THE WORD LIMITATION ISSUE WARRANTS REVIEW BY THIS COURT

The Board's brief does not challenge the ripeness of the word limitation issue raised in the Petition, but the Board's brief characterizes that issue as not raising "any issue of recurring importance". (Op. Cert. 18). This is plainly wrong. Appellate courts are regularly called upon to determine whether the complexity of a case requires them to exercise their discretion to increase the word limitations set forth in F.R. App. P. 32(a)(7). While those judges face legitimate concerns about the difficulty of processing an increasing number of cases through an already overworked federal court system, it is important for this Court to establish that these legitimate pressures will not justify briefing limitations that undeniably abridge a party's substantive statutory and constitutional rights in contravention of 28 U.S.C. § 2072.

We submit that this Court is unlikely to ever be presented with a clearer example of the danger and harm that can result when judicial expediency tempts appellate judges to limit briefing space as a means of limiting the issues a party may raise on appeal. Beverly petitioned the court of appeals to review 42 of 76 unfair labor practice findings in the underlying cases, but Beverly was required to challenge those 42 unfair labor practice findings in the space of only 25 pages -- roughly one-half of a page in which to: (1) summarize relevant facts; (2) identify applicable legal precedents and explain their application; and (3) develop compelling supporting arguments. It obviously was impossible to do this, and the effect of the court's word limitation was to deny Beverly its statutory

right to obtain meaningful review under 29 U.S.C. § 160(f).[1]

It is particularly inappropriate for the Board's Brief to defend the court of appeals' word limitation on the ground that "the court of appeals also had access to the entire record." (Op. Cert. 17). First, "the entire record" consists of more than 14,000 transcript pages and more than 4,000 exhibits (App. J, K). It is disingenuous for the Board to imply that the Court of Appeals realistically would search the record on its own to assess whether substantial evidence supported the 42 challenged findings in the 140 pages that make up the Board's decision in this consolidated proceeding and to imply that such a search is an adequate substitute for focused briefing by the petitioning party.

Second, the Board knows very well that the burden of the Court of Appeals' word limitation did not fall equally on Beverly and the Board. The Board's two underlying decisions effectively constituted a 140 page brief

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[1] The Board's Brief (Op. Cert. 17) criticizes the Petition for failing to demonstrate that additional briefing space would have transformed a losing argument into a winning argument on specific unfair labor practice findings, and the Board's brief simultaneously characterizes the word limitation issue as being "entirely fact-based" (Id.). Each criticism is unfounded. This Court has ample experience from its own NLRA-related cases to understand -- without any allegation-by-allegation inquiry -- that one-half of a page is not adequate space to summarize relevant facts, identify applicable precedent and set forth compelling arguments for overturning a lengthy Board decision. If the Petition for Writ of Certiorari is granted, Beverly can use the subsequent merits brief to identify some examples of the factual and legal errors in the court of appeals' decision that were caused by the improvident word limitation, but such a presentation is not appropriate in a Petition for Writ of Certiorari, which stresses solely the need for Supreme Court review of the court of appeals' actions.

thoroughly setting forth the Board's view as to what evidence and legal authorities supported its decision. The Board's Brief to the Court of Appeals could -- and frequently did -- simply cite to and adopt the lengthy versions of facts and arguments contained in the Board's decision, whereas Beverly did not have that luxury and was required to forego entire legal arguments and descriptions of factual discrepancies in order to fit its position within the word limitation.

One of the primary reasons that this Court should grant the Petition in this case is that this prejudicial denial of Beverly's statutory right of appellate review is a direct and intentional result of the Board's litigation strategy which stockpiled[2] five years worth of separate cases into a single proceeding (Pet. 6-7). By doing this, the Board created a consolidated proceeding that was 32 times larger than the type of ordinary Board proceeding contemplated in 29 U.S.C. § 160(f). It was the court of appeals' obligation to recognize that this 3,200% increase in the size of the proceeding required more than the 40% increase in briefing space granted by the court of appeals in this case.

Beverly will never be able to adequately impress upon this Court the level of deep frustration and sense of helplessness that results from being denied the opportunity for meaningful appellate review of the two underlying decisions. Beverly knew very well that the Board's issuance of a corporate-wide order in the underlying cases was inevitable -- not because such an order was merited but because the Board's General Counsel had committed substantial resources, both in terms of money and personnel, to the consolidation and prosecution

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[2] The characterization of these case having been "stockpiled" is an observation made by the Board's own administrative law judge (App. G at 593a). It has never been denied by the Board.

of this litigation, and the General Counsel had done so largely at the expense of the individual employees who, instead of having their disputes resolved expeditiously through the Board's regular processes, were required to wait, in some cases more than ten years, for final relief. There was simply no possibility that this collective investment would be declared by the Board to be "all for naught" through a decision in Beverly II and Beverly III denying a corporate-wide order. Moreover, Beverly knew that the Board would need to find as many unfair labor practices as it could in these two cases in order to provide a factual basis to support a corporate-wide order, which meant that the evidence and legal authorities related to particular unfair labor practice findings would be stretched as far as possible to support as many unfair labor practice findings as possible.

Beverly could accept this unpalatable reality because it knew that the Board's findings and conclusions would be subject to neutral appellate review -- as contemplated by 29 U.S.C. § 160(f) -- at which point Beverly would have the opportunity to demonstrate the lack of substantial evidence supporting the various findings.[3] The court of appeals' word limitation, however, denied Beverly that opportunity. In doing so, the court of appeals

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[3] Beverly had faced this same sense of inevitability in the Beverly I consolidated litigation, but similarly had taken comfort in the knowledge that the Board's anticipated order would be subject to court of appeals review. Beverly's faith in the process was rewarded when the Court of Appeals for the Second Circuit, after granting adequate briefing space, denied the corporate-wide order because, among other reasons, the court recognized the Board's inclination to find against Beverly if any version of the facts permitted it to do so. "Moreover, the proof in many cases, while sufficient to support the decision, was ambiguous, and contrary decisions would have been as sustainable." (App. G at 623a-624a).

simultaneously denied Beverly the statutory protection provided by 29 U.S.C. § 160(f) and deprived Beverly of the recognized property interest that every citizen possesses entitling that citizen to meaningful access to the court system under the Due Process Clause of the Fifth Amendment. (See Pet. 11-15). The court of appeals' actions are especially upsetting to Beverly because the court of appeals, having first prevented Beverly from presenting supporting facts and argument, then went on to characterize numerous Board findings as being "close calls" that the Court enforced solely because "close calls go to the Board". (App. A at 44a). See also examples at Pet. 13-14, n.5.

This Court promulgated and implemented the Federal Rules of Appellate Procedure under the authority of 28 U.S.C. § 2072, but that statutory authority contains a specific caveat that "[s]uch rules shall not abridge, enlarge or modify any substantive right." If this caveat is to have any meaning, then this Court needs to grant the Petition for Review and exercise its supervisory authority over the courts of appeals in order to prevent a Federal Rule of Appellate Procedure from being used in a manner that deprives a party of its statutory and Constitutional right to obtain appellate review of an agency order.

II.

THE COURT OF APPEALS' ENFORCEMENT OF THE BOARD'S CORPORATE-WIDE ORDER IS RIPE FOR REVIEW

The Board's Brief incorrectly asserts that the "corporate-wide order" issue is not ripe for review. The Court of Appeals unambiguously concluded that "the Board is entitled to impose corporate-wide relief." (App. A at 49a). It is that precise determination that Beverly is asking this Court to review in the Petition for Writ of Certiorari.

The only aspect of the Board's Order that has been remanded by the Court of Appeals is the ministerial task of redrafting the Order's language regarding the type of violations found by the Board. Id. The Court of Appeals characterized the Order as a "laundry list" of violations that needed to be narrowed (Id.), but the Board's entitlement to issue a corporate-wide order is decided.

The Board's reliance (Op. Cert. 12) on Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) is misplaced. In that case, the court of appeals had not remanded a purely ministerial task. Instead, the court directed the district court to determine whether acts of contempt had occurred and the magnitude of the contumacious conduct. These were the issues that were the basis for the Petition for Writ of Certiorari, and the matter plainly was not ripe.

In cases involving administrative agency determinations, the relevant consideration is whether Supreme Court review would be occurring prior to the administrative agency's policy determination. Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 200-201 (1983); Abbott Labs. v. Gardner, 387 U.S. 136, 149-151 (1967). Here, the decision to issue corporate-wide relief has been made and has been enforced, the only remaining task is for certain ministerial changes to be made in the language of particular alleged violations, and this has no impact on whether corporate-wide relief is permissible under Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Cf., Abood v. Detroit Board of Education, 431 U.S. 209, 216 n.8 (1977) (no ripeness issue where remand was "only for a ministerial purpose, such as correction of language in the trial court's judgment"); Duquesne Light Co. v. Barasch, 488 U.S. 299, 306-307 (1989) (the final judgment rule is not interpreted strictly where a remand has

occurred but the federal issue in the case has been resolved by the highest available state court).

The remainder of the Board's argument regarding the "corporate-wide order" issue is geared to demonstrating why, in the Board's opinion, its issuance of a corporate-wide order was consistent with applicable precedent. This argument regarding the merits, however, does not demonstrate that review by this Court is improvident. To the contrary, it demonstrates the importance of this legal issue for the increasing number of employers throughout the United States who operate from more than one location and face the risk of having the Board extend the terms of its orders beyond the locations where unfair labor practices are found to have occurred.

The one thing that is noteworthy about the Board's Brief in this regard is the utter absence of any argument by the Board addressing the important distinction between the Board's authority to issue a cease-and-desist order, which is analyzed under a "necessary to prevent future unfair labor practices" standard (Pet. 24), versus an affirmative action order such as the notice-posting requirement in this case, which is analyzed under a much more stringent standard allowing affirmative action only to the extent necessary to expunge the effects of unfair labor practices that have occurred (Pet. 16-17). The Board's notice-posting requirement is an affirmative action remedy that is unjustifiable given the undisputed fact that the unfair labor practices at particular facilities in this case had no impact beyond the individual facilities where the unfair labor practice occurred.

The Board's Brief glosses over the important distinction between "affirmative action" relief and "cease-and-desist" relief, characterizing a corporate-wide notice-posting provision as merely something that "complements a corporate-wide cease-and-desist order." (Op. Cert. 17). The Court of Appeals uncritically did the

same. A Writ of Certiorari is necessary in order to emphasize the distinction between the two forms of relief, and this case provides an ideal vehicle for clarifying that distinction in the unprecedented context of a nationwide remedial order.

III.

CONCLUSION

For each of the foregoing reasons, Petitioner respectfully submits the Writ should be granted.

Respectfully submitted,

/s/

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